Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

COMMENTS

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EXECUTIVE SUMMARY

The American Cable Association ("ACA") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned Restoring Internet Freedom rulemaking. ACA and its member companies have been and remain fully committed to ensuring consumers have access to a free and open Internet and welcome this opportunity to comment upon a public policy framework that will create a regulatory environment conducive to a free and open Internet and continued innovation and investment by all Internet actors.

For over a decade prior to its 2015 Title II reclassification decision, the Commission had created a highly successful "light-touch" regulatory environment for broadband Internet service providers ("ISPs") by classifying them as providers of "information service" under Title I of the Act. The ISP businesses of ACA's approximately 750 member companies, representing a diverse mix of cable operators, rural telecommunications companies and municipalities, thrived in this environment. These companies in aggregate offer advanced communications services to approximately 7 million homes, businesses, and community institutions throughout a 19 million home footprint (14% of total homes) touching every state of the country. The median number of homes served by an ACA member is about 1,000. ACA members are thus significantly smaller than the largest broadband ISPs and the popular Internet content, applications and services ("edge") providers who utilize their networks.

While many ACA members are small, privately held companies, these companies have invested significantly in maintaining robust high-performance networks. Their investments brought competition to incumbent broadband providers in urban areas, and new and/or improved services in rural regions of the country. Unfortunately, all of their efforts to advance broadband deployment and adoption through investment and innovation were put at risk by the Commission's abrupt decision in 2015 to change course, reclassify broadband Internet access service as a "telecommunications service," and subject them to regulation as common carriers under Title II.

The Commission's Title II reclassification decision and the imposition of common carrier regulation was wholly unnecessary to protect the free and open Internet and extremely burdensome and harmful to smaller ISPs. It caused companies to incur increased costs – both direct and indirect – and divert their money and attention toward backward-looking regulatory compliance efforts and away from planned broadband Internet service and network upgrades and expansions, thus delaying, deferring or forgoing the benefits they would have brought to their bottom-lines, their customers and their communities.

These harms were not outweighed by countervailing public interest benefits. ACA members have been following the four policy principles set forth in the Commission's 2005 Internet Policy Statement as well as the Commission's 2010 codification of the transparency principle, and will continue to do so regardless of the outcome of these proceedings. They do not, and have committed not to block, throttle, or censor Internet traffic. They are transparent with their customers about the commercial terms, network practices and network performance associated with their residential broadband Internet access service. They do so not only because the policy principles strike an appropriate balance between service provider and consumer needs, but because they make good business sense and are broadly accepted across the Internet ecosystem.

In the interest of sound public policy, the Commission not only can change its mind on regulatory classification of broadband Internet access service, it absolutely should. From a policy perspective, Title II reclassification had a detrimental impact on the preeminent national policy goal of encouraging broadband deployment and the provision of advanced communications services. The decision was based on the flawed premise that ISPs are subject to limited competition, act as "gatekeepers" to their customers' freedom to access what they choose on the Internet and the ability of Internet edge providers to freely reach those broadband customers and that the market will fail to deter ISPs from unreasonably denying service to or discriminating against customers or edge providers. This premise was demonstrably wrong for smaller ISPs, who lack the leverage to harm Internet edge providers and lack the incentive to harm their own customers.

ACA focuses its initial comments on three areas: the harms caused by the Commission's Title II reclassification decision; the justification for restoration of the information service classification; and restoration of an appropriate light touch regulatory approach under Title I, including elimination of the Internet General Conduct standard and examination of the need for *ex ante* "Net Neutrality" rules – no blocking, no throttling, no paid prioritization – and for the Transparency Rule.

Harmful Impacts of Title II Regulation on Smaller ISPs

ACA member companies and their customers and communities were harmed by Title II reclassification because it increased smaller ISP costs and decreased their incentive and ability to roll out new features and services and expand their broadband Internet access services and networks.

Increased costs. The imposition of common carrier status was extremely burdensome and costly for smaller ISPs, leaving them subject to the self-executing commands of core Title II provisions and any regulations the Commission might chose to impose in implementing these commands.

ACA members confirm that common carrier status increased their costs and regulatory uncertainty, harming their businesses. Following Title II reclassification, ACA members spent significant resources and incurred unexpected legal and consulting costs in trying to understand the impact of the decision and what it meant for their existing and planned services, and in taking steps to minimize the risk of enforcement actions and consumer complaints. As a result of their regulatory compliance reviews, for example, members directed counsel to revise consumer-facing notices and policies and marketing programs. The threat of *ex post* rate regulation hung particularly heavy over their heads, requiring smaller ISPs, who are especially risk-averse, causing them to run all current and planned offerings against the "just" and "reasonable" and unreasonably discriminatory standards of Sections 201 and 202 of the Act, increasing their legal costs and causing them to set aside increased litigation reserves. As a result, members had to divert their scarce resources to backward-looking regulatory compliance and away from forward-looking investments and service innovations. In addition to increased regulatory compliance costs, members experienced increased costs for financing their businesses and network upgrades and expansions, and increases in their pole attachment rates, all directly attributable to Title II reclassification.

Decreased incentive and ability to innovate and invest. Reclassification has decreased ACA members' ability and incentive to develop and deploy innovative new features and services

and has negatively impacted their existing business models. It has harmed their ability to invest in their services and networks.

Members who were using usage-based billing practices have changed or abandoned their use, while others have held off or delayed moving to usage-based billing and data cap and allowances. Yet others have held off or delayed launching "individualized" arrangements with edge providers that would improve their end user customers' Internet experience and lowered their costs. All of these actions were taken as a result of regulatory uncertainty under Title II and the Commission's Internet General Conduct standard. Although data caps and overage charges help members educate and send useful pricing signals to customers who utilize a disproportionate amount of bandwidth each month, and help generate revenues that can be plowed back into network improvements, members either dropped or delayed their use. They did so even when forgoing data caps and overage charges helped them defray the costs of bandwidth transport to remote systems, and despite knowing their use had not been prohibited by the Commission because of the potential for FCC enforcement. ACA members, fearful of the prospect of rate regulation, also found themselves reluctant to roll out other new features and services, including dedicated access services to improve voice offerings and use of caching arrangements that would have benefitted the ISPs by lowering their transport costs.

ACA members report cutting back and/or delaying network upgrade and expansion plans and new equipment purchases, delaying acquiring other broadband properties, and hiring new staff as a result of the Title II decision. The key driver cited in these decisions is the potential threat of after-the-fact rate regulation that would impair their ability to recoup their investment and repay loans. Some curtailed investments to expand into rural, unserved areas, forgoing economic opportunities and leaving those residents without the benefit of access to broadband Internet service. Others decreased their hiring and the purchase of additional systems as a result of the uncertainty created by the Title II reclassification.

Restoration of Title I information service classification. Revocation of Title II status and return to an information service classification will benefit consumers and competition by relieving smaller ISPs of the fear of moving forward with plans for major system upgrades, rebuilds and deployment of new features and services by taking common carrier rate regulation completely off the table. These companies will then be able to return their focus and resources to expanding broadband Internet service and networks, addressing broadband adoption and helping to close the digital divide.

A Title I Information Service Classification is Consistent with the Statute and Within the Commission's Legal Authority

The Commission took an unwarranted detour from the text of the Communications Act and sound public policy when it reclassified broadband it reclassified broadband Internet access as a Title II telecommunications service. The NPRM wisely proposes to return the Commission to the correct path as a legal matter by restoring the information service classification and relieving ISPs of the harmful overhang of utility-style regulation. ACA agrees with the Commission that the text and structure of the Act as well as Commission precedent and sound public policy support an information service classification and that the Commission has the legal authority to return the service to its classification as an information service. Despite the findings in the 2015 Open Internet Order suggesting otherwise, nothing in the fundamentals of the way that ISPs are offering and providing broadband Internet access service had changed by 2015 – they have always and continue to offer a functionally integrated service giving consumers the ability to access, transform and utilize Internet content, applications and services. That is, the

factual particulars of how broadband Internet access service is offered and provided have remained constant since the inception of the service and support an information service classification. This suggests the Commission lacked a sound factual basis for its decision in 2015 and that restoring the information service classification is entirely proper. Furthermore, the decision ran directly contrary to a long line of Commission determinations establishing that, under the Act's service and technology-specific regulatory framework, ISPs were not, and should not be treated as, providers of "telecommunications service," as well as other provisions of the Act strongly suggesting Congress intended an information service classification for this interactive computer service. The courts have established that the Commission has the legal authority to classify broadband Internet access as an information service, as well as reconsider its previous classification decisions, and the Commission is more than justified in exercising that authority in this instance.

Ensuring an Appropriate Regulatory Framework Under Title I

ACA commends the Commission for proposing to return to a "light-touch" regulatory approach and eliminate, without replacement, the Internet General Conduct standard, and for asking the right questions about the need for *ex ante* regulation of broadband Internet access service, including whether to retain, modify or eliminate some of all of the three "bright line" "Net Neutrality" prohibitions as well as the Transparency Rule. The Commission has authority under Section 706 of the Act to retain or adopt appropriate protections for the free and open Internet, should it determine the costs of having *ex ante* rules are outweighed by the benefits.

Elimination of Internet General Conduct Standard. ACA emphatically supports the Commission's proposed elimination of the Internet General Conduct standard. The rule was not only ill-conceived and unnecessary, it is hopeless vague and open-ended, leaving broadband ISPs guessing about what behaviors the Commission would find unacceptable after-the-fact, particularly regarding service terms and pricing. It is a costly rule that cast a pall over ACA member operations and planning without any corresponding consumer benefit.

Bright Line Net Neutrality Prohibitions. Broadband deployment has flourished because information services were kept largely "unfettered" by federal and state regulation over the course of two decades. ACA remains skeptical that the record in this proceeding will support the retention of *ex ante* Net Neutrality rules, given the lack of widespread problems with ISP handling of traffic or otherwise. In particular, there is no threat, that smaller ISPs would block, throttle or otherwise discriminate against Internet edge providers because doing so would not allow them to extract any consideration from the comparably larger actors who operate on the Internet's edge and any attempt to do so would only result in these smaller ISPs angering and losing subscribers to competitors due to their impairment of their customers' Internet experience. Nonetheless, ACA members, along with other broadband ISPs, share the desire to preserve the open Internet and have committed to doing so, regardless of the outcome of this proceeding. To the extent the Commission determines, however, that the benefits of having enforceable Net Neutrality rules would outweigh their costs, including for smaller ISPs, any rules it fashions that prohibit, for example, blocking and unreasonable discrimination, should apply to ISPs and Internet edge providers alike, to avoid the market distorting effects of asymmetric regulation in the multi-sided Internet marketplace.

Transparency Rule. ACA agrees with the NPRM's observation that disclosure requirements can be among the least intrusive of regulatory measures at the Commission's disposal. There is no dispute that consumers expect and deserve to receive to receive accurate information about broadband Internet access service at the point of sale and on an on-going

basis as subscribers to the service. So too, Internet edge providers benefit from understanding how broadband ISPs are managing their networks so that they can take network management practices into account when developing their content, applications, services, and devices. Notwithstanding the benefits of such transparency, as part of the Commission's examination of whether *ex ante* rules are necessary, ACA urges the Commission to explore ways to reduce the complexity of compliance with its mandate, particularly for smaller ISPs.

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COMMENTS

I. INTRODUCTION

The American Cable Association ("ACA") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Commission in the above-captioned proceeding.[1] ACA commends the Commission for proposing to return broadband Internet access service to its Title I information service classification, proposing to eliminate, without replacement, the Internet General Conduct standard and for asking the right questions about the need for *ex ante* regulation of broadband Internet access service and whether, specifically, to retain, modify or eliminate some or all of the three bright-line "Net Neutrality" prohibitions as well as the Transparency Rule. The reclassification of broadband Internet access as a Title II telecommunications service was a mistake from a legal and policy perspective, especially for

[1] *Restoring Internet Freedom,* Notice of Proposed Rulemaking, WC Docket No. 17-108 (rel. May 23, 2017) ("NPRM").

the smaller broadband Internet service providers ("ISPs") who were harmed by having their Internet service subjected to Title II common carrier regulation. Revocation of Title II status will not itself cause diminution of Internet openness or harm to consumers, it will simply restore the regulatory status quo that existed from the 1990s until 2015 that treated Internet access service as a lightly regulated Title I information service.

For nearly two decades, the "light-touch" regulatory environment for broadband Internet access services proved highly successful and was embraced by both Democrats and Republicans. This regime led to explosive growth in Internet content, applications and services, as well as substantial deployment of high performance broadband networks and services. In particular, the ISP businesses of ACA member companies, representing a diverse mix of cable operators, rural telecommunications companies and municipalities, have thrived in this environment. These operators, many of whom are small, privately held companies, invested significantly in infrastructure over the last decade to provide a suite of advanced communications services to homes, businesses and community institutions. The Commission's "light-touch" approach provided these operators as well as larger providers a stable regulatory environment that inspired confidence of earning a fair return on their investments. Their investments have benefitted their customers and communities and have brought competition to incumbent broadband providers in urban areas, and new and/or improved services in rural regions of the country.

ACA and its member companies have been and remain fully committed to protecting and promoting an open Internet and welcome this opportunity to comment upon the right public policy to ensure that the Internet remains free and open once Title I status has been returned to broadband Internet access service.[2]

[2] ACA's approximately 750 member companies are a diverse mix of cable operators, rural telecommunications companies and municipalities. Many ACA members are small, privately held companies with deep roots in their communities. No ACA member has more than one million video

These comments are organized as follows. In Section II, ACA describes the harmful effects of Title II reclassification on its smaller ISP members' businesses, customers and communities and argues the decision should be revisited because it imposed unwarranted costs and burdens that impeded its members' incentive and ability to expand broadband networks and services with benefit to consumers or Internet openness. Section III examines how restoration of a Title I information service classification for broadband Internet access service is consistent with the text and structure of the statute and the Commission's authority to make such a classification under relevant court precedents. In Section IV, ACA supports elimination of the Internet General Conduct standard and discusses the Commission's options for framing an appropriate regulatory framework for broadband Internet access service under Title I of the Act.

II. THE COMMISSION SHOULD REVISIT ITS TITLE II RECLASSIFICATION DECISION BECAUSE IT IMPOSED UNWARRANTED COSTS AND BURDENS ON SMALLER BROADBAND INTERNET SERVICE PROVIDERS THAT IMPEDED THEIR INCENTIVE AND ABILITY TO EXPAND BROADBAND NETWORKS AND SERVICES TO THE DETRIMENT OF CONSUMERS

ACA commends the Commission for revisiting its ill-conceived decision to impose common carrier status on broadband Internet access service providers by reclassifying it as a Title II telecommunications service. Common carrier treatment was unwarranted, based on the record before the Commission, and unwise as it imposed significant new regulatory compliance costs on smaller ISPs, chilling their incentive and ability to roll out new services and features and improve and expand their broadband networks, forcing them to delay or defer investment plans, and, in turn, harming their customers and communities. From the perspective of ACA members, who lack the incentive and ability to harm the open Internet, Title II reclassification was all cost and no benefit.

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subscribers and the median number of video subscribers per member is 1,060. *See Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28 and 10-127, Comments of the American Cable Association, Exhibit B, Connecting Hometown America, How Small Operators of ACA are Having a Big Impact, A paper by American Cable Association, Research and Analysis by Cartesian, at 1-3 ("2014 Cartesian Report").

ACA and its member companies predicted that they would be harmed if the Commission proceeded with its plan to subject broadband ISPs to common carrier regulation by reclassifying them as providers of "telecommunications service."[3] Sadly, their predictions have proven true. The experiences of ACA member companies overwhelmingly confirm the Commission's thesis that its 2015 "decision to reclassify broadband Internet access service as a telecommunications service subject to Title II regulation has resulted in negative consequences for American consumers—including depressed broadband investment and reduced innovation because of increased regulatory burdens and regulatory uncertainty stemming from the rules adopted under Title II."[4] The NPRM's predictive judgment that restoration of "broadband Internet access service to its previous status as an information service subject to Title I is in the public interest because it will alleviate the harms caused by Title II reclassification" is all the more supported by the plights of smaller ISPs, many of whom suffered significant harms under common carrier status.[5] As discussed below, ACA members large and small attest to the fact that the Title II reclassification decision had the direct and immediate result of introducing regulatory uncertainty and regulatory compliance costs into their businesses. In addition, the threat of regulatory enforcement, either on the Commission's own initiative or in response to the filing of a Section 208 complaint by any person has dampened their incentive and ability to invest in

[3] *See, e.g.*, Letter from Robert J. Dunker, Owner/President, Atwood Cable Systems, et al., to The Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28 and 10-127 (filed Feb. 17, 2015) ("24 Small ISPs Letter"); Letter from Roy Baker, President, ACCESS Cable Television, Inc., et al., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127 (filed Feb. 19, 2015) ("59 Small ISPs Letter"); Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127 (filed Feb. 2, 2015) ("ACA Feb. 2, 2015 Ex Parte"); Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127 (filed Feb. 19, 2015) ("ACA Feb. 19, 2015 Ex Parte").

[4] NPRM, ¶ 44.

[5] *Id*., ¶¶ 44, 46.

their broadband Internet network and services and deploy innovative services and features. This, in turn, has harmed their businesses, their customers, and their communities.[6]

A. Title II Common Carrier Status Increased Compliance Costs and Regulatory Uncertainty for Smaller ISPs.

The Commission's imposition of common carrier status was extremely burdensome and costly for smaller ISPs. In its 2015 Open Internet Order, the Commission brushed aside the warnings of smaller ISPs that changing the regulatory status of broadband Internet access service from a lightly regulated Title I information service to a Title II telecommunications service, subject to 19th century common carrier regulation, would harm their businesses and consumers. Instead, the Commission predicted that reclassification would not increase costs and depress investment and declined to forbear from core common carrier provisions of the Act for smaller ISPs.[7] This decision left smaller ISPs subject to both the self-executing commands of Title II and any regulations the Commission may choose to impose in implementing these commands. These burdens, which arise from common carrier status, are not insignificant.

In preparation for filing these comments, ACA interviewed its members about the various ways in which the Commission's reclassification decision affected their businesses and the

[6] In support of these comments, ACA attaches sworn declarations from 5 representative member companies, including: three small broadband Internet access service providers targeting rural, hard-to-serve, sparsely populated areas as well as suburban areas, a non-profit municipal provider, and an innovative overbuilder serving smaller markets, some of whose service areas include economically-challenged communities and broadband adoption problems. None of these providers has more than 51,000 residential broadband subscribers, and the smallest serves only 2,500 subscribers. Declaration of Jim Hickle, President, Velocity Telephone, Inc./Gigabit Minnesota (Attached as Exhibit A) ("Hickle Declaration"); Declaration of Chris Kyle, Vice President of Industry Relations & Regulatory, Shenandoah Telephone Company (Attached as Exhibit B) ("Kyle Declaration"); Declaration of Brian Lynch, Senior Vice President of Cable Operations, Schurz Communications, Inc. (Attached as Exhibit C) ("Lynch Declaration"); Declaration of Richard Sjoberg, President & CEO, Sjoberg's Inc. (Attached as Exhibit D) ("Sjoberg Declaration"); Declaration of Steve Timcoe, Superintendent – CATV Telecommunications, Wyandotte Cable (Attached as Exhibit E) ("Timcoe Declaration").

[7] *See, e.g.*, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 410 (investment would not decline), ¶¶ 444 & n.1325, 453 (declining to forbear from Sections 201, 202, 206-208 for smaller ISPs) (2015) ("2015 Open Internet Order"); ACA Feb. 19, 2015 Ex Parte at 2-4.

manner in which they offer and provide broadband Internet access service. ACA's smaller ISP members have confirmed that in fact they have experienced the ill effects of the Title II reclassification identified in the NPRM and would benefit from its reversal.[8]

1. Common carrier status increased costs and regulatory uncertainty for smaller ISPs and harmed their businesses.

As the NPRM correctly observes, "Internet service providers have finite resources, and requiring providers to divert some of those resources to newly imposed regulatory requirements adopted under Title II will, unsurprisingly, reduce expenditures that benefit consumers," and, further, that this harmful impact has fallen most heavily on smaller ISPs, "many of whom lack the dedicated compliance staffs and financial resources of the nation's largest providers."[9] The experiences of ACA members amply confirm the NPRM's premise that smaller ISPs were especially burdened by the imposition of Title II status on their broadband Internet access service. ACA members were forced to devote greater resources, both in terms of time and money, to dealing with increases in the level of regulatory uncertainty caused by the reclassification decision and in understanding and complying with their new status as broadband ISP common carriers, with its attendant regulatory requirements. Their experiences vividly attest to the various ways in which the overhang of regulatory enforcement of vague Title II mandates and standards has dampened their incentive to invest and innovate, causing them to delay, defer or shelve planned service and network improvements and expansions, thus

[8] *See* NPRM, ¶ 47; *see, e.g.*, Letter from Herb Longware, President, Cable Communications of Willsboro, Inc., et al. to The Honorable Ajit Pai, Chairman, FCC, GN Docket No. 14-28 and WC Docket No. 16-106, at 2 (filed Apr. 25, 2017) ("22 Small ISPs Letter") (stating that the 2015 Open Internet rules "hang like a black cloud" over small ISPs); ACA Feb. 19, 2016 Ex Parte at 2-3 (discussing the substantial and tangible burdens that would be imposed on small ISPs by virtue of being involuntarily relegated to common carrier status in their provision of broadband Internet access service for the first time pursuant to Sections 201 and 202, together with being subject to the complaint and enforcement provisions applicable to common carriers in Sections 206-209).

[9] NPRM, ¶¶ 46-47.

harming their subscribers and the communities they serve or would have served but for Title II reclassification.

a. Increased regulatory uncertainty and compliance costs.

The change in regulatory status from Title I to Title II harmed the economics of ACA member businesses by vastly increasing the level of regulatory uncertainty they experienced and the costs of regulatory compliance in this uncertain climate.[10] Following Title II reclassification, ACA members spent significant resources attempting to understand the impact of the new requirements and exactly what their new broadband Internet obligations mean for their existing and planned services.[11] Because the commands of Sections 201 and 202 are both far-reaching and self-executing,[12] even in the absence of specific *ex ante* Commission regulations, the Commission's application of just these two statutory commands to broadband Internet access service forced smaller ISPs to hire consultants and outside counsel well versed in Title II regulation to evaluate whether their existing rates, terms, conditions and practices were in conformity with the Act and assess the risk that they could be later judged to be out of compliance as a result of changes in the market or other external factors.[13] Moreover, providers

[10] *See* Hickle Declaration, ¶ 7; Lynch Declaration, ¶ 6; Kyle Declaration, ¶ 7; Sjoberg Declaration, ¶ 6; Timcoe Declaration, ¶ 7.

[11] *See, e.g.*, Timcoe Declaration, ¶ 8 ("Following Title II reclassification, we spent significant resources in our attempts to understand the impact of the new requirements.").

[12] *See* 47 U.S.C. §§ 201(a) ("It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor"); § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such [common carrier] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful"); § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").

[13] *See, e.g.*, Sjoberg Declaration, ¶ 8 ("We had to pay outside counsel to help our staff understand our new Title II obligations and the new Internet General Conduct standard and ensure that our existing service and consumer-facing disclosures and notices comply with these requirements."); Hickle Declaration, ¶ 11 ("Title II reclassification … caused us to incur costs to review and revise our current

felt the need to run past these outside experts any planned changes in their rates, terms, conditions, and practices to ensure their risk of enforcement action remains low.

Many ACA members, having begun their businesses solely as cable operators, faced a steep uphill climb in understanding common carrier obligations, having previously had "zero experience" with the key statutory Title II obligations under Sections 201 and 202 that require them to offer service in a just, reasonable and non-discriminatory manner.[14] The Title II decision opened ACA members to "a flood of excessively burdensome new regulatory requirements at both the federal and state level, including the potential for rate regulation, dramatically increasing the level of regulatory uncertainty" facing member companies.[15] ACA members cite the vagueness of terms such as "unjust" and "unreasonable" as applied to their Internet access services, and their fears that their broadband Internet access rates and practices would be deemed unlawful after-the-fact by the Commission or the courts.[16] As a result of this increased regulatory uncertainty, ACA members report expending significant resources in terms of staff time and having to hire outside consultants and counsel to help them understand their new Title II obligations and how to comply with the Internet General Conduct

services to ensure compliance with the new standards."); Kyle Declaration, ¶¶ 8-12 (describing resources spent on compliance review following Title II reclassification).

[14] *See* Sjoberg Declaration, ¶ 6 ("None of the services we offer had ever been classified as a common carrier service by the FCC or our state public utility commission prior to the FCC's reclassification decision."); Lynch Declaration, ¶ 6 (Up until the time of the Title II reclassification decision, "we had no experience with either the main statutory Title II obligations – Sections 201 and 202 – or the FCC's rules and decisions implementing them."). Approximately 60 percent of ACA member companies, like Sjoberg's, began offering cable service and later added broadband Internet access (cable modem) and digital voice. The remainder of its membership is comprised of telephone companies, like Shentel, that added video and broadband Internet access, or initiated service as triple-play providers offering voice, video and broadband Internet access. *See* Kyle Declaration, ¶ 3.

[15] Timcoe Declaration, ¶ 7. *See also* Hickle Declaration, ¶ 8; Sjoberg Declaration, ¶ 6; Lynch Declaration, ¶ 6.

[16] *See* Hickle Declaration, ¶ 9; Kyle Declaration, ¶ 8; Lynch Declaration, ¶ 7; Timcoe Declaration, ¶ 8; Sjoberg Declaration, ¶ 7.

standard, which the Commission said was an application of Section 201(b) to their broadband Internet access service.[17]

Even ACA telco member companies that offer traditional regulated telephony services and were otherwise familiar with core Title II obligations struggled with what the new reasonableness and discrimination standards would mean for their "charges, practices, classifications, and regulations for and in connection with" broadband Internet access service in the absence of implementing regulations designed specifically with the unique attributes of that service in mind.[18] For example, Shenandoah Telephone Company ("Shentel") started as a rural local exchange carrier in Shenandoah County, Virginia.[19] Despite its telephone common carrier heritage, even Shentel found itself in uncharted waters in terms of Title II compliance for its broadband Internet access service following the Commission's 2015 reclassification decision. As Chris Kyle, Vice President of Industry Relations & Regulatory, Shentel, explains, "[n]either the FCC nor our state public utility commissions had treated our functionally integrated broadband Internet access service as a Title II common carrier service prior to the FCC's 2015 Open Internet Order. This left us uncertain how common carrier obligations would be applied to our broadband Internet access service, and the FCC's Order offered us little concrete guidance in that regard."[20] Mr. Kyle further noted that although Shentel is "familiar with Title II standards

[17] *See* Hickle Declaration, ¶ 9; Lynch Declaration, ¶ 7; Timcoe Declaration, ¶ 8; Sjoberg Declaration, ¶ 7; Kyle Declaration, ¶ 8 (Shentel "spent significant resources attempting to identify exactly what our new broadband Internet obligations are").

[18] *See* Hickle Declaration, ¶ 9 ("While we are familiar with Title II for voice telephony … we also know that these terms ['just and reasonable' and not unjustly or unreasonably discriminatory] are vague and open to a variety of interpretations…."); Kyle Declaration, ¶ 8 ("We could not determine how [the Section 201(a)] requirements would apply to the way we provide broadband Internet access service….").

[19] Kyle Declaration, ¶ 3.

[20] *Id*., ¶ 7. Mr. Kyle further noted that, as "an incumbent rural phone carrier, we are well aware of the extent of common carrier regulatory burdens and the heightened standards applied to every action a common carrier takes under the statute. We spent considerable additional funds to ensure that we can justify our broadband Internet rates, terms, conditions and practices as "reasonable" and not "unreasonably" discriminatory. After the order came out, we had to have our staff and outside

for voice telephony – that is, to be deemed lawful under Title II, the rates, terms, conditions and practices associated with our service must be 'just and reasonable' and not unjustly or unreasonably discriminatory – we also know these terms are vague and open to a variety of interpretations."[21]

Among the added direct costs incurred by ACA members following the reclassification decision were the costs of paying outside counsel or consultants familiar with Title II obligations to perform a variety of tasks, including reviewing and amending consumer facing notices and policies, reviewing and amending existing and planned service features, data collections and recordkeeping, reviews that ate into their time and financial resources.[22] These added legal reviews caused members to incur "'well out of trend' legal expenses."[23] Several members reported having to alter their customer-facing disclosures and notices to comply with Title II requirements after these reviews, as well as having to alter their broadband data collection and recordkeeping practices, and service plans.[24] The addition of a Title II compliance review level, both retrospectively and as an ongoing matter, increases these providers' costs of service and detracts from the resources available for service improvements and network expansion.[25]

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counsel/consultants run our planning through the Title II "just and reasonable" and the Internet General Conduct "no unreasonable interference/disadvantage" standard, increasing our costs of service." *Id*., ¶ 9.

[21] *Id*., ¶ 8.

[22] *See* Sjoberg Declaration; Timcoe Declaration; Hickle Declaration; Kyle Declaration.

[23] Lynch Declaration, ¶ 3.

[24] Sjoberg Declaration, ¶ 8; Kyle Declaration, ¶ 10; Lynch Declaration, ¶ 3.

[25] Kyle Declaration, ¶ 9 ("After the order came out, we had to have our staff and outside counsel/consultants run our planning through the Title II 'just and reasonable' and the Internet General Conduct 'no unreasonable interference/disadvantage' standards, increasing our costs of service. For example, we analyze peak node usage to determine when we need to add capacity and usually add capacity if a neighborhood node is at about 80% utilization. Because adding capacity takes time, in the interim we utilize network management tools at the node level to maintain a quality Internet experience for all users. We feared that if we employed those tools, our customers would think we were discriminating and we were concerned it would give Internet edge providers leverage to bring complaints. Although we had done this type of system utilization analysis before, we had to add a new layer of review by our staff and outside counsel for consistency with Title II obligations and the Internet General Conduct standard. This extra layer of review adds to our cost of service and detracts from the resources we have available for service improvements and network expansion.").

For example, Jim Hickle, President of Velocity Telephone, Inc./Gigabit Minnesota ("Velocity"), an innovative provider of residential broadband Internet access in the Minneapolis-St. Paul metropolitan area, reports that Velocity spent staff time and hired outside counsel to review and revise the company's Acceptable Use Policy, which also contains the terms and conditions governing its broadband Internet service, to ensure compliance with Title II obligations.[26] As Mr. Hickle explained, not only did Velocity incur costs to review and revise its current practices to ensure compliance with the new standards, "[w]e will also have to conduct similar reviews on any new features and services we are considering rolling-out, thus increasing the costs of these services as well. We are a cash-flow business; these reviews imposed costs, and money spent on regulatory compliance is money taken away from putting fiber in the ground."[27] Shentel, too, found itself bulking up on legal and consulting services as a result of the increased regulatory burdens we were facing as a result of the Title II decision. "Needless to say, all of this extra legal review added to our costs."[28]

Brian Lynch, Senior Vice President of Cable Operations for Schurz Communications Inc., which operates Antietam Cable Inc. ("Antietam") in rural western Maryland, also attested to the fact that just the risk of an enforcement action under Section 208 "required us to increase the amount of time and money we spent on legal services and recordkeeping and, going

[26] Hickle Declaration, ¶ 3 (Velocity is a competitive local exchange carrier and offering voice, video and Internet to residential and business customers and Gigabit Minnesota is a fiber-based provider of voice, video, data and Internet, collectively serving 2,500 residential broadband Internet access customers).

[27] *Id.*, ¶¶ 10-11. Mr. Hickle also explained how, as a result of one of these reviews, Velocity altered its data cap to insulate the company from the risk of Title II litigation over whether its cap was "reasonable," causing it to forgo potential revenues from overage charges that it could have "plowed back into our network." *Id.*, ¶ 11.

[28] Kyle Declaration, ¶ 10.

forward, requires us to ensure funds are always available to defend ourselves against enforcement actions."[29]

In addition to the threat of enforcement actions initiated by the Commission itself, ACA members are now subject to subscriber complaints via Sections 207 and 208 of the Act.[30] This potential for liability for violations of Section 201 or 202 (failure to provide service upon reasonable request; unjust, unreasonable or unreasonably discriminatory rates) via the Section 208 complaint process is especially troubling to smaller ISPs, given the Commission's decision to refrain from forbearing from enforcement provisions that are related to its Section 208 authority, including the recovery and awards of monetary damages under Sections 207 and 209 for violations of the provisions of Title II.[31] Members know that even this Commission will be obligated to respond to complaints about rates or seeking open access to facilities by third-party providers, and they legitimately fear that such rate regulation will have a direct and adverse impact on their ability to finance their networks and repay debt obligations.[32]

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[29] Lynch Declaration, ¶ 8 (Antietam serves residents and businesses in Washington County, Maryland, including Hagerstown the county seat; Antietam has approximately 32,000 residential broadband Internet subscribers).

[30] As common carriers, broadband ISPs became subject to complaints filed at the Commission by any person under Section 208 for any act or omission in connection with their broadband Internet access service, including potentially claims for monetary damages and attorney's fees or filed in the federal courts by any person claiming monetary damages from such acts or omissions under Section 207. 47 U.S.C. §§ 207, 208.

[31] 2015 Open Internet Order, ¶¶ 453-455.

[32] *See, e.g.*, Sjoberg Declaration, ¶ 7; Lynch Declaration, ¶ 7; Kyle Declaration, ¶¶ 8-9. Prior to adoption of the 2015 Open Internet Order, ACA's municipal members explained to the Commission how Title II regulation would undermine the business model that supports their networks, raise their costs and hinder their ability to further deploy broadband. Letter from Randy Darwin Tilk, Utility Manager, Alta Municipal Broadband Communications, et al., to The Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28 and 10-127, at 1-2 (filed Feb. 10, 2015) ("43 Muni ISPs Member Letter"). They noted that the Commission in the past had "relied upon Sections 201 and 202, together with the complaint procedures contained in Section 208, to impose rate regulation – either by rule or by addressing complaint cases – resale, unbundling (open access) and collocation requirements on common carriers," and stated that their "ability to repay current debt obligations and raise capital at attractive rates could well be adversely affected if we lose control over our retail rates or the use of and access to our networks. Because our rates must be set to recover costs, we would be forced to flow these additional costs of service through to our subscribers." *Id*.

Among the specific matters requiring additional legal analysis cited by Shentel were determinations regarding compliance with the statutory restrictions on carrier use of customer proprietary network information ("CPNI") in Section 222. Being subjected to Section 222 alone required the company to go back across its entire broadband Internet subscriber base to ensure that it was providing an opt-in function where they believed it to be required, even in advance of the Commission adopting implementing regulations. Just the review alone was a very complicated undertaking, involving a great deal of staff time and imposing additional costs.[33] Additionally, Shentel was forced to spend resources to review its method for determining whether it is economical to extend broadband Internet connections to requesting customers and how much of the economic burden of that should be borne by the customer. With respect to the latter analysis, Mr. Kyle explained that:

> Because of reclassification, we had the added burden of being subject to a Section 208 complaint at the FCC if we determined we couldn't fill a request under our normal parameters and the customer felt aggrieved. This makes a difference in rural America. We build anywhere, and a lot of people will pay their reasonable share of the build out expenses, but some are not happy with that. If a customer does not want to pay for some of the build out, it could claim that we are being unreasonable in asking for a customer contribution to defray the costs and file a complaint with the FCC. Defending against such a complaint is a costly proposition. We had to set aside additional reserves to take account of the added risks resulting from the change in our regulatory status.[34]

Members also reported a substantial diversion of company energy and time to Title II compliance. According to Dick Sjoberg, President & CEO of Sjoberg's, Inc., not only was he, as CEO, forced to spend time on Title II compliance due to "'big picture' concerns," his company

[33] Kyle Declaration, ¶ 11 ("[A]lthough we are familiar with the [statutory] requirements for carrier use of customer proprietary network information ('CPNI') under Section 222 of the Act, and already have to comply with those for our voice services, we had to determine anew how to comply with the statute with regard to CPNI for our broadband Internet access customers….. Regardless of what happened with the FCC's Broadband Privacy Order, the statutory commands of Section 222 have been applicable to our service since the 2015 Open Internet Order went into effect and continue to apply today. We had to use outside counsel to review our broadband Internet access data collection, use and sharing practices to ensure their compliance with the CPNI provisions of the Act").

[34] *Id*., ¶ 12.

"switched at least 10 percent of the energy of company staff who must shoulder a variety of responsibilities over to tracking Title II impacts," office time "that could have been far more productively spent on forward-looking business decisions rather than reviewing past actions against the new common carrier standards."[35]

The Commission's decision to refrain from imposing *ex ante* rate regulation under Section 201 or to require tariffs under Section 203, or engage in last-mile unbundling under Section 251, offered smaller ISPs at best cold comfort.[36] ACA members are well-aware of the fact that the Commission has in the past imposed structural separations, service unbundling and resale obligations under Sections 201 and 202, and, so long as the Title II classification stands, even this Commission cannot bind the actions of a future Commission should it wish to institute rate regulation, tariffing, unbundling or any other form of before-the-fact regulation, creating deep and lasting regulatory uncertainty.[37]

The prospect of *ex post* rate regulation alone hung particularly heavy over the heads of ACA members, forcing them to run all of their current and planned offerings against the "just," "reasonable" and not unreasonably discriminatory standards.[38] Several ACA members discussed how they took little comfort from the Commission's decision to forbear from tariffing requirements, noting that any person can file a complaint concerning these matters with the Commission alleging a violation of Title II requirements, and the Commission is required to act

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[35] Sjoberg Declaration, ¶ 8.

[36] 2015 Open Internet Order, ¶¶ 452, 497-98, 514, 528. *See* Sjoberg Declaration, ¶ 15; Timcoe Declaration, ¶ 9.

[37] 43 Muni ISPs Member Letter at 2; 24 Small ISPs Letter at 1; 59 Small ISPs Letter at 1. As Commissioner O'Rielly observed in his dissenting statement, the forbearance exercised by the Commission in its 2015 Open Internet Order was more accurately characterized as "fauxbearance" because, by retaining its expansive authority under Sections 201 and 202 in place, the Commission could effectively impose obligations nearly identical to those it was forbearing from imposing at the time, such as carrier unbundling and accounting standards. *See* 2015 Open Internet Order, Dissent of Commissioner O'Rielly at 5996-97.

[38] *See* Sjoberg Declaration; Hickle Declaration.

on those complaints, leaving the prospect of after-the-fact rate regulation all too real.[39] Others noted how their fears derive from the long lasting, adverse impact of the Commission's implementation of cable rate regulation they experienced in the 1990s, which fell particularly harshly on smaller cable operators.[40]

Antietam's Mr. Lynch stated that the company was "not assured by FCC statements that the government would not impose rate regulation despite the lack of immediate tariffing requirements, and we made protectionist moves to shelter the company from risk of enforcement action," lamenting that because the company has "limited resources . . . the extra money spent on ongoing regulatory compliance as a result of the Title II decision is money that is not used for more productive purposes," like network and service improvements.[41] Smaller ISPs tend to be risk averse, and for good reason. As smaller companies, they have to be scrupulously diligent against the threat of the sorts of hefty enforcement actions the Commission had recently engaged in – leveling huge fines for what appeared to be minor infractions.[42] While a large provider with tens of millions of subscribers likely has the wherewithal to either absorb or litigate such fines, for a company with under 10,000 subscribers, like Sjoberg's, for example, "a huge fine can be devastating. Even if you win these cases, you lose because of

[39] Timcoe Declaration, ¶ 9; Lynch Declaration, ¶ 3.

[40] Sjoberg Declaration, ¶ 15 ("We saw the harmful effects of cable rate regulation on investment following the FCC's implementation of the 1992 Cable Act. There was a rate freeze, which stopped industry investment in its tracks. Even when the FCC lifted the freeze for the larger operators, it was kept in place for some time for the smaller operators, with truly devastating effects on our ability to improve our plant and service. Having learned from this experience, we were wary of the prospect of rate regulation for our broadband Internet access service under Title II."); Timcoe Declaration, ¶ 9 ("We took no comfort from statements that the Commission would refrain from rate regulation. Those statements were simply not believable. We had no faith the government would adhere to that position over time.").

[41] Lynch Declaration, ¶ 3.

[42] Sjoberg Declaration, ¶ 8.

how expensive it is to fight the battle. All these extra costs add up and deplete our scarce resources."[43]

b. Increased financing costs.

Several ACA members have described harm to their ability to finance their business flowing from Title II reclassification, including how the "mere threat that the Commission may use its Title II authority and the General Conduct rule to impose rate regulation affects their ability to obtain financing."[44] Title II reclassification was factored into the calculation of lending institutions for several ACA members attempting to get outside financing and the new classification along with its increased regulatory uncertainty raised their cost of capital. One member reported that a national bank with which it had done business had initially approved a loan for a fiber network acquisition the company wished to make, "and then suddenly backed off," about the time of the release of the 2015 Open Internet Order, forcing them to find another bank, increasing the amount of work required to obtain financing, and delaying receipt of the needed funding.[45] Sjoberg's experienced similar problems, resulting in a significant percentage point increase in its borrowing rates that could not be explained by anything other than the intense uncertainty cause by the Title II decision.

> The Title II decision and Internet General Conduct standard also harmed our ability to finance our business by increasing our cost of capital. I cannot emphasize strongly enough the burden of incurring the additional cost of borrowing and the additional paperwork and "due diligence" that was required by our bankers because of their concern over Title II. For financing, we deal with a local bank and a large national bank. We found our borrowing costs increased at both banks following the Title II reclassification. Sjoberg's had been borrowing at the prime rate, and, for a long time, federal interest rates did not increase. They did start to inch up in 2015, by about ½ to ¾ of a percent, but we found our costs of borrowing rose even more than those increases. Since the Title II reclassification went through in early 2015, our borrowing rates went up 1-1/8 percent or 1.12%. That is, our rates increased 3/8 of a percent over prime after the Title II decision went into effect. Title II was the only external difference between the borrowing rates we received 3-6 months prior to the decision and

[43] *Id*.

[44] 22 Small ISPs Letter at 2.

[45] Hickle Declaration, ¶ 12.

> those received 3-6 months after. There were no other major changes in our business to account for this. Our business had actually become more profitable. We were able to pay off some loans early, and were borrowing for our next wave of expansion. I have sat on a bank board for 20 years, understand a bank's thinking and decision making, and I know from experience that bankers get nervous when they see uncertainty and the Title II decision caused uncertainty in spades.[46]

As smaller businesses often serving rural or underserved communities, ACA members rely on their ability to raise capital in order to take the first steps to expand their networks or deploy broadband access. When the costs of financing projects are impacted as much as it was by the Title II reclassification, as these testimonies describe, not only does it divert precious resources into basic fundraising efforts, it is consumers that suffer from the diminished investment.

c. Increases in pole attachment rates.

Many ACA members were hit with pole attachment rate increases, despite the Commission's indication that it did not intend that as a result of reclassification, during the period of time following the effective date of the 2015 Open Internet Order and prior to the effective date of the Commission's order bringing the cable and telecom pole attachment rates into approximate parity.[47] Mr. Kyle reported that Shentel "incurred additional direct costs associated with the change in our status when one of the utilities whose poles we use insisted that we pay the telecom rate, rather than the cable rate, for pole attachments after the 2015 Open Internet Order took effect."[48] Based on the Commission's assurance, Shentel refused the rate increase and the utility sued. Although Shentel eventually settled, it saw a substantial

[46] Sjoberg Declaration, ¶ 9. References to percentages in Mr. Sjoberg's declaration are to percentage point increases.

[47] *See* 2015 Open Internet Order, ¶ 482 ("[I]t is not the Commission's intent to see any increase in the rates for pole attachments paid by cable operators that also provide broadband Internet access service….").

[48] Kyle Declaration, ¶ 13.

increase in its pole attachment rates during the roughly 9 to 12-month period of time from the effective date of the 2015 Open Internet Order until the subsequent Commission action, as the "power company took advantage of the reclassification and subsequent confusion about the appropriate pole attachment rate levels to jack up its rate and there was little we could do about it. This increased our costs needlessly and it was a direct result of the Title II decision."[49]

These examples illustrate the types of increased costs imposed on smaller ISPs directly resulting from the Commission's Title II reclassification decision. As the ACA members have affirmed, extra money spent on regulatory compliance, including reserves to cover potential enforcement actions under Title II, is money that is not used for more productive purposes, such as improved services, network improvements, and broadband adoption efforts.

* * *

In addition to the foregoing, it was all but certain that smaller ISPs would see additional increases in compliance burdens and costs as the Commission turned to adopting implementing regulations under other non-forborne provisions, including, for example, Title II carrier privacy and disabilities access provisions.[50] It is no wonder ACA members have described Title II hanging "like a black cloud" over their heads.[51]

B. Title II Status Decreased the Incentive and Ability of Smaller ISPs to Roll Out New Features and Services and to Invest in Improving and Expanding Their Broadband Internet Services and Networks.

The NPRM cites filings by numerous smaller ISPs describing how, since reclassification, they "have been forced to reduce their investment and halt the expansion of their networks, and slow, if not delay, the development and deployment of innovative new offerings," and others

[49] *Id*.

[50] 47 U.S.C. §§ 222, 225 and 251(a)(2). Indeed, had Congress not acted to disapprove the Commission's 2016 Broadband Privacy Order, the compliance burdens on smaller ISPs would have been astronomical. *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Pub. L. No. 115-22, 131 Stat. 88 (enacting S.J. Res. 34, 115th Cong.) (2017).

[51] 22 Small ISPs Letter at 2.

who "have had to modify or abandon altogether past business models to account for the increased compliance costs and depressed investment from outside investors."[52] Although most of ACA's members finance their operations through revenues and bank loans, in all other respects this is an extremely accurate summation of their experiences as a result of the 2015 Open Internet Order.

1. Impaired development and deployment of new features and services and impairment of existing business models.

ACA members reported a range of negative impacts on their ability and incentive to develop and deploy innovative new features and services and the need to alter existing business models as a result of being subjected to Title II regulation and the Internet General Conduct standard. Impacts included holding off or delaying moving to usage-based billing and data caps and allowances, changing or abandoning existing use of these models, and holding off or delaying launching "individualized" arrangements with edge providers that would improve the end user experience because of the uncertainty created by Title II reclassification and the Commission's Internet General Conduct standard.

For example, ACA member companies report that using data caps or data allowances and overage charges help them educate and send useful pricing signals to customers who utilize a disproportionate amount of bandwidth per month, but that their ability to either continue with their existing caps or roll out a data allowance/overage charge program was adversely impacted by the Commission's decision, despite the Commission declining to prohibit them outright.[53]

Sjoberg's, for example, found it necessary to abandon its use of data caps as a network management tool altogether, "because of the potential for FCC enforcement, even though the

[52] NPRM, ¶ 47.

[53] 2015 Open Internet Order, ¶ 153.

2015 Open Internet Order did not prohibit their use."[54] Mr. Sjoberg explained that he was aware of the Commission's investigation of data cap use by the larger ISPs, and, as a risk-averse smaller company, Sjoberg's could not risk a similar investigation of its use of data caps, so discontinued their use altogether.[55] This decision, in turn, had a detrimental effect on their business because Sjoberg's pays a lot of money to bring Internet connectivity out to its remote system.

> We are located 330 miles northwest of Minneapolis, a data aggregation point. We pay $13 per each Mbps of transport capacity. When an individual customer uses more than a certain amount of data (typically 250-300 GB), we lose profitability because we must add transport capacity to provide a good Internet experience for all. Currently, 10-11 percent of our customers are over this limit in their monthly usage, so, although it is difficult to quantify, we do lose money on them and are essentially subsidizing some of their Internet use. We have considered raising our prices, but we face competition from a fixed wireline broadband provider, three mobile wireless Internet service providers, one fixed wireless provider, and satellite video providers and we do not want to lose customers.[56]

Sjoberg's was not alone in altering its use of data caps and overage charges. Mr. Kyle explains how, prior to 2014, Shentel had been tracking customer data usage with the aim of fully rolling out data allowances and charges for overages later that year, after finding that a small number of its broadband Internet access users greatly exceeded reasonable bandwidth usage per month, maxing-out capacity in part of the network and causing capacity issues for other users.[57]

We felt that assessing overage fees for exceeding data allowances would create

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[54] Sjoberg Declaration, ¶ 12.

[55] *Id*. ("FCC enforcement messages are received loud and clear, especially by smaller, risk-averse businesses like us. It was unclear for what reason the larger ISPs' data cap usage was being investigated by the FCC, and so we had no way of knowing whether what we were doing would also be deemed investigation worthy, or worse yet, subject to fine. We just could not take the risk that our data caps would not be found in violation of the Title II 'just and reasonable' requirement or the Internet General Conduct Standard. Unlike the larger ISPs who have some flexibility to absorb enforcement costs, we are a small company and don't have the financial wherewithal to fight against the government even if we think we will prevail. Because the FCC would not give an ironclad seal of approval for data caps, they were too risky for us to continue to employ.").

[56] *Id*., ¶ 13.

[57] Kyle Declaration, ¶ 15.

> an economic incentive to deter that kind of practice. By sending those users accurate pricing signals about their bandwidth usage, we thought we could educate those who were unaware of the extent of their usage, and move some users to a higher tier of service that is more consistent with their usage patterns and needs. Importantly, the overage charges would generate revenues that we could invest back in the network to expand capacity. However, we could not be assured that the FCC would agree that our data allowances are a "just and reasonable" network management and pricing practice. Despite the fact that this would enhance and improve service for all our customers, we could not be sure if it would be considered a violation under Title II or the Internet General Conduct standard. There was just no certainty that these practices would be found to pass muster under the law if we had to justify them after-the-fact in an enforcement action. Accordingly, we altered and delayed our data allowance plans and did not even begin our customer education program of putting usage data on customer bills (but not assessing overage charges) until July or August of 2015, delaying the benefits that full roll out of our data allowance plan would bring.[58]

After its review, Mr. Hickle stated that Velocity altered its "data cap practices out of fear that our prior practices might run afoul of the vague Title II and Internet General conduct standards."[59] Mr. Hickle explained that Velocity was using a data cap of 300 GB/month and overage charges "to provide better service for all our customers by preventing a small number of customers from utilizing a disproportionate amount of shared bandwidth," but following the Title II decision, raised the cap to 1,000 GB/month, despite the fact that setting the cap so high (where it was highly unlikely to be exceeded even by Velocity's heaviest users) caused them to "forgo overage revenues that we could have plowed back into our network."[60] Velocity made that decision solely to avoid being subjected to "a complaint filed against us on the grounds that 'we aren't being reasonable based on Title II requirements.'"[61]

Mr. Hickle reports that the uncertainty caused by Title II reclassification and the prospect of rate regulation had depressed Velocity's incentive to roll out other new features and services

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[58] *Id*.

[59] Hickle Declaration, ¶ 11.

[60] *Id*.

[61] *Id*.

to consumers as well. Velocity had been considering, but decided against, employing "better network management tools and rolling out an over-the-top video product and a service that would allow customers to pay for dedicated access to a certain channel over fiber to improve voice service, but pushed off any deployment of these services following Title II."[62] Despite the fact that these practices would enhance and improve its customers' service, Velocity decided against deploying them because "[t]here is no certainty that these practices would be found to pass muster under the law if we had to justify them after-the-fact in an enforcement action."[63]

Mr. Sjoberg similarly describes "the chilling effect on innovation" of the Title II decision on Sjoberg's consideration of service improvements. "At every turn, we have to ask ourselves question such as, if we enter a deal with an Internet edge provider to improve service to our customers, will the FCC open an investigation even if the provider assures us it is legal?"[64] Concern with retroactive FCC determinations that some Title II mandate had been violated led Sjoberg's to abandon consideration of a caching arrangement, either on a general basis or with a Netflix caching appliance, which would have benefited Sjoberg's by lowering its cost of Internet transport.[65]

In summary, the ability of these smaller ISPs to employ beneficial pricing features allowing them to better manage network capacity for the benefit of all users and roll out innovative new features and services was impaired by the Title II decision and, as a result, they altered or abandoned pricing models and lost revenues as well as refrained from taking the risks associated with new features and services. As a result, the profitability of their businesses and their ability to invest money back in their networks and services suffered.

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[62] *Id*., ¶ 14.

[63] *Id*.

[64] Sjoberg Declaration, ¶ 11.

[65] *Id*.

2. Decreased investment in broadband Internet networks.

ACA members also described the negative impact Title II reclassification had on their plans for investment in broadband Internet services and networks. Members report cutting back and/or delaying network upgrade and expansion plans and new equipment purchases, delaying acquiring other broadband properties, and hiring new staff as result of the Title II decision. The key driver cited in these decisions is the potential threat of after-the-fact rate regulation that would impair members' ability to recoup their investment and repay loans.[66]

Cut backs and delays in planned upgrades. Cut backs and delays in plans to pursue next generation rebuilds of their networks were reported by several ACA members. Antietam, for example, pulled back the scope of planned investment and deployment in a fiber buildout of its system as a result of the Title II decision, curtailing its scope and delaying the timing of the buildout.[67] Antietam operates a cable hybrid fiber-coax system in Washington County, Maryland and self-funds its fiber deployments through revenues. The company recognized the value of upgrading to fiber-to-the-home as a next generation, high performance network solution, and, with the encouragement of the city of Hagerstown, had planned to do a phased fiber buildout, starting with the economically-challenged city core.[68] Antietam's "intention was to deploy fiber in the economically depressed downtown core of Hagerstown to promote economic development and also go beyond the core to bring fiber to an even larger area than the city had contemplated."[69] However, as Antietam was planning this fiber rebuild, it became aware of the

[66] *See id.*, ¶ 14; Lynch Declaration, ¶ 4; Timcoe Declaration, ¶ 9; Hickle Declaration, ¶ 15.

[67] *See* Letter from Brian Lynch, President, Antietam Cable Television, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108 (filed Jul. 14, 2017) (describing discussion with Chairman Pai during his visit to Hagerstown concerning "how the FCC's 2015 Open Internet Order reclassifying our broadband Internet access as a Title II telecommunications service has had a detrimental impact on our Gigabit fiber buildout plans, causing us to pull back on the scope of planned investment and deployment, and delay, for a year, bringing the benefits of Gigabit fiber broadband Internet access services to a larger area of the region we serve").

[68] Lynch Declaration, ¶ 5.

[69] *Id*.

FCC's plan to reclassify broadband Internet as a Title II service in its Open Internet proceeding. Although it went ahead with the project, Antietam curtailed its scope and altered the timing of its fiber investment and deployment. As Mr. Lynch explained, "[t]he prospect of Title II rate regulation curbed our enthusiasm for making a greater investment in rebuilding more of our network with fiber to bring higher capacity broadband Internet service to more of our rural Maryland county."[70] As a result, rather than spending $6 million to serve 12,000 households in Phase I of their project, Antietam completed its fiber build covering 6,000 homes passed with an investment of $3 million in September 2016. According to Mr. Lynch,

> [Antietam] suppressed [its] expenditures for the second half of the Phase One project, an additional 6,000 households because of the uncertainty surrounding Title II reclassification – for example, the threat of rate regulation or open access requirements. This delayed bringing the economic benefits of the fiber build to the city generally and access to even faster Gigabit broadband service to the affected city residents in particular."[71]

Although Antietam has resumed work on the fiber buildout, "[b]ut for the Title II decision, we would have fully built out the 12,000 homes we intended to pass in 2016, and we and the city would have reaped the benefits sooner."[72]

Velocity also reports that Title II reclassification and the threat of rate regulation dramatically slowed its decisions to invest in its broadband Internet service through upgrades and expansions. Mr. Hickle explains that, prior to the Commission's 2015 Open Internet Order, Velocity had intended to improve portions of its fiber system in the Rosemount, Minnesota area during the summer of 2015, but delayed upgrades to assess the impact of the Title II decision. "But for the Title II decision, we would have upgraded and expanded the service earlier and reaped the competitive benefits sooner."[73]

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[70] *Id*., ¶ 4.

[71] *Id*., ¶ 6.

[72] *Id*.

[73] Hickle Declaration, ¶ 15.

Wyandotte Cable, a municipally-owned provider of voice, video and broadband services, according to its Superintendent – CATV Telecommunications, Steve Timcoe, also hesitated to move forward with investments in its network as a result of Title II reclassification despite facing competitive pressure to keep up with the capabilities of surrounding systems. Although Wyandotte knew it would need a new system architecture to offer the highest quality service to keep pace with the competition, regulatory uncertainty delayed a decision on a full system rebuild in 2015 and 2016.

> The level of regulatory uncertainty facing Wyandotte grew tremendously with this decision, depressing the level of investment we were comfortable making given the prospect of rate regulation hanging over our heads. We took no comfort from statements that the Commission would refrain from rate regulation. Those statements were simply not believable. We had no faith the government would adhere to that position over time. With the Title II classification, we had a real and grounded fear of rate regulation, having seen the impact of cable rate regulation on the cable industry in the early 1990s.[74]

As a result of this concern, Wyandotte could not guarantee that its business would be viable if it undertook a next generation rebuild of its system.

Curtailed investments to expand into rural unserved areas. ACA member plans to spread broadband deployment to unserved areas similarly took a direct hit following the Title II decision. Sjoberg's, for example, covers mainly sparsely populated regions in upper Northwest Minnesota, averaging under 20 homes passed per mile, and serving in its communities anywhere from as few as 23 customers to as many as 3,300 customers.[75] Sjoberg's has "opportunities to extend our network further into rural areas with fewer households per mile," but was forced to consider whether to borrow money to execute a plan with an 8-10 year horizon, with Title II regulation, particularly rate regulation "looming overhead."[76] Although Mr. Sjoberg affirmed that the company would otherwise be interested in serving additional rural areas, it

[74] Timcoe Declaration, ¶ 9.

[75] Sjoberg Declaration, ¶ 3.

[76] *Id*., ¶ 14.

"cannot take the risk of making that investment because of the potential of Title II rate regulation," which causes increases in the interest rates available to Sjoberg's for financing such expansions.[77] Mr. Sjoberg further noted that "there is no guarantee that future FCCs will refrain from exercising the agency's clear authority to regulate rates under Sections 201 and 202 of the Act or use the Internet General Conduct standard to regulate them through after-the-fact enforcement actions."[78] Having lived through the harmful impact of the FCC's regulation of cable rates in the 1990s, "which stopped industry investment in its tracks" and had a "devastating effect" on smaller operators, Sjoberg's was duly wary of the prospect of rate regulation for its broadband Internet service under Title II.[79]

> [T]his is not some abstract fear for us. We at Sjoberg's have our own money on the line – our houses and cars are pledged against our bank loans – so we have our own skin in the game. After-the-fact rate regulation means I could lose everything I have as the result of a regulatory regime designed to constrain the behavior of large monopolists. It simply makes no sense. But the fact of the matter is that the looming threat of FCC rate regulation and an uncertain regulatory environment makes us very hesitant to take on new risks, despite our desire to expand broadband in rural areas.[80]

As a result of the threat of rate regulation, Sjoberg's delayed not only expansions but upgrades of its existing plant. Mr. Sjoberg explained that "upgrades require very large capital investments that must be spread over a long period of time to make the investment work."[81] Even if the current Commission were unlikely to rate regulate broadband Internet access, uncertainty about what the next Commission might do in that regard means that "the investment certainty period right now under Title II is less than four years, which is very short for large

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[77] *Id*., ¶ 15.

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] *Id*., ¶ 17.

capital investments, and it causes a lot of projects to become non-starters" for a risk-averse company like Sjoberg's.[82]

Decreases in hiring. ACA members were also harmed in the ability to invest in hiring staff as a result of the reclassification decision. Mr. Hickle, for example, reported that Velocity refrained from hiring new staff as an outflow of the Title II decision.[83] Despite losing its General Manager over a year ago, Velocity held off hiring of an expensive employee to take his place, dividing up those tasks among other, less qualified employees.[84] Velocity felt it would be better to have that money in reserve. Mr. Sjoberg reports that had the company gone forward with the recent network build-out it had contemplated, Sjoberg's "would have applied for state and federal grants and hired a technician to oversee the work."[85]

Decreased purchases of additional systems. Uncertainty created by Title II reclassification has also negatively affected member plans to invest by buying other systems. Mr. Hickle again ascribes the slowing of Velocity's appetite for investing in the purchase of other properties to the uncertainty created by the Commission's 2015 decision.[86] Although Velocity, as a broadband company, is always looking for opportunities to acquire new systems, "[c]urrently, because of the regulatory overhang of Title II, we have no appetite to buy more systems because Title II regulation – particularly the potential for rate regulation – depresses the level of our potential return on these investments. Without a doubt, Title II factors into the investment climate and our decision-making. We run every potential deal through that filter."[87]

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[82] *Id*.

[83] Hickle Declaration, ¶ 16.

[84] *Id*. ("Although we collectively could not match the general manager's skill set this way, we assessed the regulatory costs of Title II and made the choice not to hire a more expensive employee. We struggled for eight months without this role filled, and in my view, this had a detrimental impact on our operations.").

[85] Sjoberg Declaration, ¶ 16.

[86] Hickle Declaration, ¶ 17.

[87] *Id*.

Velocity's last fiber system purchase was in 2014, and, Mr. Hickle states, the company "has not made an investment of a similar magnitude since reclassification even though there were opportunities for acquisitions."[88]

Only recently, in anticipation of the Commission's plans to revoke the Title II classification of broadband Internet access service, has the market responded with an increase in system and company acquisitions. With the restoration of a more favorable regulatory climate in the offing, a number of mid-sized ACA members entered into sizable deals to grow their broadband footprint and bring the benefits of their enhanced Internet offerings to a larger subscriber base.[89]

* * *

It is evident from the foregoing that the Title II reclassification decision was especially harmful to smaller ISPs, their customers and communities, and to residents of unserved areas that will not receive broadband Internet access service in a reasonable and timely manner as a result of network operators' reasonable fears of the threat of carrier rate regulation hanging over their heads like a "black cloud."

C. Consumers and Competition Will Benefit from Restoration of the Title I Information Service Classification.

ACA and its members strongly support the Commission's goal of restoring its decades long, light-touch approach to regulation of broadband Internet access and returning the agency "to the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put in

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[88] *Id*.

[89] *See, e.g.*, Mike Farrell, *TPG to Buy Wave Broadband for $2.36B*, MULTICHANNEL NEWS (May 22, 2017, 12:00 p.m.), *available at* http://www.multichannel.com/news/finance/tpg-buy-wave-broadband-236b/413008?utm_source=dlvr.it&utm_medium=twitter; Mike Farrell, *Atlantic Broadband to Buy Metrocast for $1.4B*, MULTICHANNEL NEWS (Jul. 10, 2017, 10:01 a.m.), *available at* http://www.multichannel.com/news/cable-operators/atlantic-broadband-buy-metrocast-14b/413883.

motion by the FCC in 2015," by ending the Title II "utility-style regulatory approach" adopted in the 2015 Open Internet Order.[90] The NPRM posits that regulatory uncertainty engendered by that decision directly led to reduced investment, which has harmed consumers, and suggests restoration of the information service classification of broadband Internet access service will "lead to a faster closing of the digital divide for rural and low-income consumers, higher speeds and more competition for all consumers, as well as more affordable prices."[91] As discussed above, ACA's members experienced increased regulatory uncertainty and increased regulatory compliance costs which, in turn, decreased their incentive and ability to invest in, improve upon and expand their broadband Internet service and networks. These delayed or forgone investments, in turn, would have permitted them to provide increased options to consumers and competition to other providers in areas already served by broadband, to reach unserved and rural areas, and decreased their ability to take steps to increase broadband adoption and close the digital divide as quickly as they would have liked to do but for the Title II decision.

ACA members attest to the fact that a Commission decision to revoke the Title II classification will benefit consumers and competition by relieving these small providers of the fear of moving forward with plans for major system upgrades and new services by taking carrier rate regulation completely off the table.[92] Mr. Kyle, for example, states that "[r]emoving the overhang of Title II uncertainty will remove the hesitation we have felt in moving ahead with offering consumers innovative new features and services and improving our existing service offerings. It will allow Shentel to focus more fully on increasing broadband deployment in hard-to-serve rural areas and devote its scarce resources on finding ways to incent broadband adoption by households lacking Internet access today rather spending our limited time and

[90] NPRM, ¶ 5.

[91] *Id*., ¶¶ 48-49.

[92] *See* Lynch Declaration, ¶ 7; Timcoe Declaration, ¶ 13; Hickle Declaration, ¶ 18; Sjoberg Declaration, ¶ 18.

financial resources on backward-looking Title II compliance efforts."[93] For Antietam, it will "remove the hesitation we have felt in moving ahead and offering consumers innovative new services and doing further upgrades and expansion of our broadband network."[94] Similarly, for Wyandotte, "[i]f the Title II classification is revoked, we will use the money we have set aside to embark on a full system rebuild."[95] As Mr. Sjoberg explained,

> An FCC decision to revoke the Title II classification will relieve us of the fear of moving forward with plans for a major system rebuild and new services by completely taking rate regulation off the table. Everyone stops when there is a minefield ahead. For us, Title II is a minefield. Removing the overhang of Title II regulatory uncertainty will remove the hesitation we have felt in moving ahead with offering consumers innovative new services and upgrading and expanding our broadband network into unserved rural areas. It will allow us to focus on forward-looking innovations and investments rather than backward-looking compliance efforts.[96]

Finally, in the words of Mr. Timcoe,

> Without a doubt, the Title II classification has impacted the decisions on our plant expenditures. If we are left alone by the government, we would invest in the best interests of our citizens and make better decisions as we develop our business plans for the benefit of our citizens than would be made under heavy-handed federal regulation and oversight. Even as a municipal provider, we operate as a competitive business in a competitive market, not as a governmental monopoly.[97]

As these small ISPs confirm, not only is the Commission correct that it may return to greater reliance on free market forces and competition to bring a better, faster, and more open Internet without imperiling the welfare of either consumers or Internet edge providers, its action will hasten the restoration of these benefits and bring them more quickly and more cheaply to the American people.

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[93] Kyle Declaration, ¶ 16.

[94] Lynch Declaration, ¶ 7.

[95] Timcoe Declaration, ¶ 13.

[96] Sjoberg Declaration, ¶ 18.

[97] Timcoe Declaration, ¶ 12.

D. The Imposition of Title II Common Carrier Status on Smaller ISPs was Unnecessary to Preserve and Protect the Open Internet.

All of the foregoing harms to ACA members, their businesses, customers and communities were avoidable. ACA and its member companies filed extensive data and analysis in response to the 2014 Open Internet NPRM demonstrating that smaller ISPs lack either an incentive to harm the openness of the Internet or the leverage to inflict harm on Internet edge providers, and that "reclassifying and regulating smaller ISPs' broadband Internet access service as a common carrier service was unjustifiable, contrary to law and represents regulatory overkill."[98] Numerous ACA members attested to the fact that they support an open Internet, neither have reason nor incentive to block or discriminate among edge providers and harm their consumers, nor otherwise engage in unreasonable, discriminatory or anticompetitive acts and practices because they face competition and "compete hard to attract and serve customers who would depart to our competitors if we were to engage in any business practices that interfere with their Internet experience."[99] As ACA has explained to the Commission, its members have unique relationships with their communities and they know that giving their customers unfettered, robust access to the Internet is not only good for them but good for businesses as well.[100]

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[98] 24 Small ISPs Letter at 1; *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28 and 10-127, Comments of the American Cable Association at 38 (filed Jul. 17, 2014) ("ACA 2014 Open Internet Comments"); ACA 2014 Open Internet Comments, William Lehr, MIT, *The Mistake of One-Sided Open Internet Policy* (attached as Exhibit A) ("Lehr Paper") (filed Jul. 17, 2014); *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28 and 10-127, Reply Comments of the American Cable Association at 63 (filed Sept. 15, 2014) ("ACA 2014 Open Internet Reply Comments"); Feb. 2, 2015 Ex Parte at 2-3; 43 Muni ISPs Member Letter at 1; 59 Small ISPs Letter at 1; Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127 at 3-9 (filed Jan. 12, 2015) ("ACA Jan. 12, 2015 Ex Parte") (Title II reclassification unjustified as a legal matter).

[99] *See, e.g.*, 59 Small ISPs Letter at 1; Hickle Declaration, ¶¶ 4-5 ("Customer service is an important part of our company's ethos, and I will personally take customer service calls from time to time;" "We have a strong relationship with our community. We don't offer special deals or promotions, but our customers keep coming back.").

[100] ACA Feb. 2, 2015 Ex Parte at 3.

These smaller ISPs also explained to the Commission how they must spread fixed costs of service over a smaller number of subscribers than larger ISPs, providing broadband over hard-to-serve terrains considered uneconomic by the Commission with advanced wireline broadband capability and stimulating broadband adoption by low-income residents.[101] These factors make ACA members both intensely cost-conscious and service-oriented. They are usually locally headquartered and their customers, who are also neighbors, friends and family, expect and demand this consumer- and service-oriented focus. ACA's municipal provider members are not only locally headquartered, they are, in the words of one member, "directly accountable to our city government and must be responsive to the citizens of our community who would revolt if our rates and practices were not favorable for the people."[102]

ACA member networks are usually financed through revenues derived from rates paid by their subscribers and in part through the financial markets in the form of debt. Accordingly, these providers must take a consumer-centric approach to providing service. Harming Internet openness would depress consumer satisfaction with their service and interfere with their ability to maintain a revenue stream sufficient to cover operations and to repay debt obligations and finance network upgrades and extensions. In other words, interfering with their subscribers' open Internet experience would be bad for business.

Moreover, even if these smaller ISPs had an incentive to harm or compel payments from Internet edge providers, they manifestly lack the ability to do so. Both privately held and municipally owned ACA member companies explained to the Commission why this was so. ACA member companies reported fighting just to get the attention of Internet edge providers like Netflix so that they could enter into beneficial arrangements to improve their users' Internet

[101] *See* 59 Small ISPs Letter at 1.

[102] Timcoe Declaration, ¶ 1.

experience.[103] According to a group of 59 smaller ISPs, "[i]t would be utterly useless to try to engage in [non-neutral] practices give we're so small compared to popular edge providers, like Netflix."[104] Similarly, a group of 43 municipal providers, who serve on average 4,393 residential broadband Internet access subscribers, reported to the Commission:

> As smaller ISPs, none of us individually has the market power to compel payments for unblocking, non-discriminatory treatment or paid prioritization services because we serve too few Internet subscribers to matter to edge providers such as Netflix, Amazon or Hulu, who have hundreds of millions of subscribers in the U.S. and internationally. Like the three small ISPs, including the municipal providers the Commission heard from last week, we have to work to even get the attention of companies such as Netflix for the purpose of entering into mutually beneficial settlement-free caching and peering arrangements. Some of us have succeeded; some are still trying. Simply put, ISPs of our size lack the ability to harm particular Internet edge providers or the openness of the Internet in general.
>
> Because we lack the incentive and ability to harm Internet edge providers, there is no basis for the Commission to reclassify our Internet service for the purpose of imposing any Title II common carrier obligations, but most particularly the core common carrier requirements contained in Sections 201, 202 and 208.[105]

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[103] *See* ACA Feb. 2, 2015 Ex Parte at 4 (describing the experiences of three small ACA members with edge providers).

[104] *See* 59 Small ISPs Letter at 1.

[105] 43 Muni ISPs Member Letter at 1; *see* ACA Feb. 2, 2015 Ex Parte at 3-4 (discussing lack of incentive and ability of three small ACA member ISPs to leverage Internet edge providers or harm Internet openness); *see also* 22 Small ISPs Letter at 1 ("As we told the Commission in 2015, we never have had market power or 'gatekeeper' control over our customers or upstream Internet edge providers, to justify the imposition of utility-style regulation on our broadband service. In fact, anyone remotely familiar with the markets in which we operate would understand that smaller ISPs are dedicated to serving their customers, many of whom are our neighbors, friends, and family. We are constantly investing to improve their Internet experience, and most certainly we do not – and have no incentive to – block, throttle, or degrade our customers' traffic. When it comes to edge providers, we are the ones at risk of being leveraged – just as we get leveraged by content providers in our video business. In a *New York Times* article earlier this year, the major edge providers were characterized as the 'Frightful Five,' given their scale and dominance in their own sectors, ability to dominate other sectors, and market strength to succeed against any possible competitor. As smaller ISPs, none of us stands a chance of winning a negotiating battle with the likes of Amazon, Apple, Facebook, Microsoft, or Google. We often have problems even getting Netflix to work with us so we can improve its video streaming experience for our customers. As for smaller edge providers, because we serve such a minuscule part of their current and potential customer base, they do not even know we exist and have no reason to fear us leveraging them.").

In addition to the lack of economic evidence supporting the imposition of common carrier regulation on smaller ISPs, there was a complete lack of any other indicia of either market failure, a traditional pre-requisite for the imposition of common carrier regulation,[106] or any other evidence of harm to consumers through the non-neutral behavior of smaller ISPs. The lack of such evidence is not surprising.

ACA members have been following the four policy principles set forth in the Commission's 2005 Internet Policy Statement as well as complying with the Commission's 2010 codification of the transparency principle, and will continue to do so regardless of the outcome of this proceeding.[107] They do so not only because the policy principles strike an appropriate balance between service provider and consumer needs, but because they make good business sense and are broadly accepted across the Internet ecosystem. The ability of broadband ISPs

[106] *See Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 32 FCC Rcd 3459, ¶¶ 270-285 (2017) ("BDS Order") (rejecting claims the Commission has any statutory authority to compel common carriage offerings of what otherwise are private business data service if the provider has not voluntarily done so and declining to compel common carriage where the record does not demonstrate market power under a NARUC analysis and rejecting calls for an approach to classification resting instead on the Commission's own interpretation of the statutory "telecommunications service" definition without reference to the NARUC analysis); Nat'l Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I") ("In making this [classification] determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of SMR operators to expect an indifferent holding out to the eligible user public;" and court rejected portions of an FCC order concerning special mobile radio systems "which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve."). The Commission also specifically rejected claims that this treatment was sanctioned by the *US Telecom v. FCC* decision given the narrow scope of the issues recognized by that court as having been properly presented by petitioners. BDS Order, ¶ 283, n.718.

[107] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) ("Internet Policy Statement"); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) ("2010 Open Internet Order"), *aff'd in part, vacated and remanded in part sub nom*., Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) ("Verizon").

to attract and retain subscribers depends on their ability to offer customers a valuable broadband service, and perforce, that means being able to enable customers to access and use the popular content and applications that have become well-recognized parts of the Internet experience. This will not be possible if access to popular Internet content, applications, and services is blocked by broadband ISPs or anyone else. Title II treatment under these circumstances was both unwarranted and unnecessary to secure these benefits for Internet edge providers and consumers and unduly burdensome and costly for smaller ISPs.

E. Public Policy Supports Restoration of an Information Service Classification and Return to a "Light-Touch" Approach to Broadband Internet Access Regulation.

In the interest of sound public policy, the Commission not only can change its mind on regulatory classification, it absolutely should. The Commission's 2015 decision to reclassify broadband Internet access and not forbear from applying Sections 201, 202 and 208 to smaller ISPs, as ACA had requested,[108] was neither the best reading of the statute, as discussed below, nor good public policy. From a policy perspective, Title II reclassification had a detrimental impact on the preeminent national policy goal of encouraging broadband deployment and the provision of advanced communications services,[109] thus running directly contrary to the public interest. Moreover, the decision was based on the flawed premise that ISPs are subject to limited competition and act as "gatekeepers" to their customers' freedom to access what they choose on the Internet and the ability of Internet edge providers to freely reach those broadband Internet customers and that the market may fail to deter ISPs from unreasonably denying service to, or discriminating against, customers or edge providers.[110] Yet, as discussed above

[108] ACA Feb. 2, 2015 Ex Parte.

[109] 47 U.S.C. § 1302(a); Federal Communications Commission, *Connecting America: The National Broadband Plan*, (Mar. 17, 2010), *available at* https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

[110] 2015 Open Internet Order, ¶¶ 78-85.

and demonstrated by ACA in its filings in response to the 2014 Open Internet NPRM, this premise is demonstrably wrong for smaller ISPs.[111] These smaller providers are not "terminating monopolies" in their service areas; most broadband ISPs face competition in the areas that they serve from at least one or more other ISPs, particularly overbuild systems.[112] Moreover, consumers access the Internet using many services and devices, both wireline and mobile, belying the notion that they are irretrievably captive to the dictates of a single ISP.[113] Smaller ISPs fear of the harm non-neutral actions by giant Internet edge providers would cause for their businesses is exponentially greater (and better founded) than any purported edge provider fear of small ISPs.[114] It is worth noting that with a single exception over a decade ago,[115] no small ISP has been accused or found guilty of blocking or throttling consumer access to the Internet or engaging in anticompetitive paid prioritization practices to speed up transmission of one edge provider's traffic while slowing that of others.

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[111] *See, e.g.*, ACA 2014 Open Internet Comments; Lehr Paper; ACA 2014 Open Internet Reply Comments; ACA Feb. 2, 2015 Ex Parte. *See also* Jonathan E. Nuechterlein and Christopher S. Yoo, *A Market-Oriented Analysis of the "Terminating Access Monopoly" Concept* (Nov. 29, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/894663/151129nuechterleinyooarticle.pdf ("Terminating Access Monopolies Paper") (observing that the FCC employed the related "gatekeeper" theory in its 2015 Open Internet Order and concluding that the terminating access monopoly phenomenon, strictly understood, does not itself generally threaten market failures except in very limited circumstances).

[112] *See* Terminating Access Monopolies Paper; ACA 2014 Open Internet Reply Comments at 28-33. *See also* Timcoe Declaration, ¶ 4 ("All of our customers are familiar with our competitors' service offerings and we are routinely compared to them….").

[113] ACA 2014 Open Internet Comments at 12-13; Lehr Paper at 6-7.

[114] *See* ACA 2014 Open Internet Comments at 13 (noting that edge providers possess a greater incentive and ability to engage in practices contrary to the Open Internet policy principles); Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-68, et al., at 3 (filed Oct. 7, 2014) (urging the Commission to take a balanced approach to Open Internet Rules to protect consumers against the likely threats of all actors who play a role in the multi-sided Internet market); ACA Jan. 12, 2015 Ex Parte at 3 ("If anything, smaller ISPs are at the mercy of large Internet edge providers….").

[115] *In the Matter of Madison River Communications, LLC and affiliated companies*, Consent Decree, 20 FCC Rcd 4295 (2005).

ACA emphatically agrees with the Commission's assessment that the 2015 decision to reclassify broadband Internet access service as a telecommunications service subject to Title II regulation has resulted in negative consequences for smaller ISPs, their communities and their customers, and restoring broadband Internet access to its previous status as an information service subject to Title I is in the public interest because it will alleviate the burdens and harms caused by the Title II reclassification.[116] The nearly two-decade long "light-touch" approach for broadband Internet access services followed by the Commission under Democratic and Republican Administrations[117] alike was highly successful, allowing a "virtuous circle" of Internet freedom, innovation and growth that characterizes the Internet ecosystem today.[118]

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[116] NPRM, ¶ 44.

[117] Former Chairman William Kennard, for example, understood the de-regulatory thrust of the 1996 Act and the goal of encouraging broadband deployment and Internet adoption and accordingly laid a competitive course for the future through the "Unregulation of the Internet." *See* Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar, Northern California Chapter, San Francisco, CA, *The Unregulation of the Internet: Laying a Competitive Course for the Future* (July 20, 1999), *available at* https://transition.fcc.gov/Speeches/Kennard/spwek924.html (explaining the important national policy course the Commission was chartering in refraining from imposing "open access" – unbundling mandates imposed on incumbent telecommunications carriers – on cable modem providers to encourage them to continue deploying broadband "by following the FCC's tradition of 'unregulation' of the Internet). *See also* Remarks by FCC Chairman William E. Kennard Before Legg Mason, Washington, DC, *A Stable Market, a Dynamic Internet* (Mar. 11, 1999) ("Kennard Legg Mason Remarks") ("I believe that two things are most responsible for the explosion of the Internet, the fastest growing communications tools in the history of the world. First, this tradition of openness. Second, the fact that the Internet is unregulated. . . . the FCC and the FCC alone, has jurisdiction over Internet traffic. . . . This FCC is not going to regulate the Internet."); Remarks by FCC Chairman William E. Kennard to the Federal Communications Bar Association, *A Broad(band) Vision for America* (Jun. 24, 1998) (declaring FCC policy of encouraging broadband deployment by refraining from price regulation for residential high-speed data services). Chairman Kennard again advocated reliance on market forces to facilitated Internet openness, rather than regulation, to achieve the ultimate goal of "multiple broadband pipes accessible to every American" and therefore specifically refrained from imposing "open access" – a form of unbundling imposed only on telecommunications carriers under the 1996 Act – on cable modem service providers. *See* Address of William E. Kennard, Chairman, Federal Communications Commission before the Western Show, California Cable Television Association, Los Angeles, *Broadband Cable: Next Steps* (Dec. 16, 1999), available at https://transition.fcc.gov/Speeches/Kennard/spwek944.html. As discussed below in Section IV.B, this de-regulatory, pro-competitive approach was carried on virtually unchanged under the chairmanships of Michael Powell, Kevin Martin, and even Julius Genachowski, who retained the Title I classification of broadband Internet access service even while imposing *ex ante* regulation. *See* 2010 Open Internet Order.

[118] 2015 Open Internet Order, ¶¶ 76-77 (describing the "virtuous circle" its rules would protect and promote).

ACA member companies have thrived in this environment and have been able to bring broadband Internet service to some of the hardest-to-serve regions of the country, collectively offering advanced communications services to nearly 19 million homes (14 percent of total homes) in the nation.[119] Despite their small size, ACA members have invested significantly in infrastructure to provide a suite of advanced communications services to homes, businesses and community institutions. Based on data from National Cable Television Cooperative, the National Broadband Map, and SNL Kagan, ACA has reported that its members pass 18.2 million homes with broadband plant, and serve 6.3 million subscribers. The median numbers of homes served by an ACA member is about 1,000.[120] Thus, ACA member companies are not only significantly smaller than the largest broadband ISPs, they are far smaller than the popular Internet content, applications and services ("edge") providers who utilize their networks. ACA members serve a disproportionate share of customers in small cities and rural areas. While 28 percent of the US population lives in small cities and rural areas, 42 percent of the people covered by ACA members live in these areas.[121]

Set against this impressive record of broadband deployment prior to 2015 was the paucity of consumer complaints concerning deviations from the Commission's 2005 Open Internet principles and, with one exception, a complete lack of complaints aimed at small and mid-sized broadband ISP practices.[122] In fact, the number of substantiated deviations from the Commission's Open Internet principles since 2005 is miniscule compared to the hundreds of millions of broadband Internet connections that are made *each day* in this country without

[119] ACA 2014 Open Internet Comments at 2.

[120] *See* 2014 Cartesian Report at 1-3.

[121] The population density in the broadband footprint of ACA members is 145 per square mile as compared to 709 per square mile for the top six cable multisystem operators, Comcast, Time Warner Cable, Charter Communications, Cox Communications and Bright House Networks. *See id*. at 3-7.

[122] *See* 2015 Open Internet Order, ¶ 75 ("The record on remand continues to convince us that broadband providers—including mobile broadband providers—have the incentives and ability to engage in practices that pose a threat to Internet openness, and as such, rules to protect the open nature of the Internet remain necessary.").

incident. Imposing Title II regulation where there was no market failure, let alone evidence of systemic abuse or harm to consumers at the hands of broadband ISPs, was both unjustified and demonstrably harmful, particularly to smaller ISPs. The Commission's sudden departure from its long-standing and successful "light-touch" policy approach foisted upon smaller providers, increased regulatory burdens and costs that raised their costs, imperiled their finances and impaired or delayed their ability to maintain and expand their broadband Internet offerings, to the detriment of their customers and communities.

In view of the lack of public policy justification for the Commission's decision to impose Title II status on smaller ISPs, a return to the demonstrably beneficial classification of broadband Internet access service as an information service is in the public interest and therefore good public policy. ACA members have affirmed that restoring the information service classification will remove the "dark cloud" of regulatory uncertainty and overhang of Title II rate regulation, allowing these broadband ISPs to devote their energies and resources to bringing more and better broadband Internet to the American people,[123] a national policy objective of the first order.[124]

For all these reasons, the Commission is entirely justified, from a policy perspective, in rectifying this situation by restoring the Title I information service classification, thereby relieving ISPs of all Title II regulation.[125]

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[123] *See* Lynch Declaration, ¶ 7; Timcoe Declaration, ¶ 13; Hickle Declaration, ¶ 18; Sjoberg Declaration, ¶ 18; Kyle Declaration, ¶ 16.

[124] *See* Bob Stuart, *In Visit to Waynesboro, FCC Chairman Tackles Digital Divide*, THE NEWS VIRGINIAN (Jul. 11, 2017), *available at* http://www.dailyprogress.com/newsvirginian/news/local/in-visit-to-waynesboro-fcc-chairman-tackles-digital-divide/article_3eb878aa-669b-11e7-9da0-67fedb3d7135.html ("'Crossing the digital divide is the FCC's top priority,' said [Chairman] Pai.").

[125] If, for any reason, the Commission abandons its lead proposal and retains the Title II classification for broadband Internet access service, it should simultaneously exercise its forbearance authority and relieve smaller ISPs of the obligation to comply with Sections 201, 202, 207 and 208 and as well as the Internet General Conduct standard adopted under Section 201 in the Commission's rules. To the extent that the record before the Commission in the 2014 Open Internet proceeding supported Title reclassification and imposition of the Internet General Conduct standard, it concerned solely the actions and incentives or potential actions and incentives of the largest "eyeball" ISPs. *See* ACA 2014 Open Internet Reply

III. RESTORING THE INFORMATION SERVICE CLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE IS CONSISTENT WITH THE STATUTE AND THE COMMISSION HAS THE LEGAL AUTHORITY TO MAKE THIS CLASSIFICATION

The Commission took an unwarranted detour from the text of the Communications Act and sound public policy when it reclassified broadband Internet access service as a Title II telecommunications service in the 2015 Open Internet Order. The NPRM wisely proposes to return the Commission to the correct path by restoring the information service classification and relieving ISPs of the harmful overhang of utility-style regulation. ACA agrees with the Commission that the text and structure of the Act as well as Commission precedent and sound public policy support an information service classification and that the Commission has the legal authority to return broadband Internet access service to its classification as an information service. ACA also notes that despite the findings in the 2015 Open Internet Order suggesting otherwise, nothing in the fundamentals of the way that ISPs are offering and providing broadband Internet access service had changed by 2015 – they have always and continue to offer a functionally integrated service giving consumers the ability to access, transform and utilize Internet content, applications and services.[126] This suggests that the Commission lacked

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Comments at 28-33 ("The record shows that many agree with ACA that Internet actors other than the ISPs exist that can threaten the openness of the Internet, and adopting one-sided rules that apply to ISPs in what is a multi-sided Internet marketplace would fail to protect consumers against such threats. Moreover, nearly every ISP, large and small, agrees that large edge providers are one of these other Internet actors that have the incentive and ability to engage in blocking and discrimination, and such practices would break the "virtuous circle" that the Open Internet rules are intended to keep intact. These same ISPs have also noted, as did ACA, that large edge providers have acted on their incentives, and that there are at least as many examples of blocking and discrimination by edge providers as there are by ISPs. Among those who highlight this issue, there is a near universal call for evenhanded regulatory treatment.").

[126] *See* 2015 Open Internet Order, ¶¶ 341-54 (citing changes in the nature of the service offered and its advertising as justifying the change in regulatory classification); United States Telecom Ass'n v. FCC, 825 F.3d 674, 744 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 154517 (D.C. Cir. May 1, 2017) ("USTelecom") (Williams, J., concurring in part and dissenting in part) ("To the extent the Commission relied on changed factual circumstances, its assertions of change are weak at best and linked to the Commission's change of policy by only the barest of threads."). ACA members affirm that they have always offered a functionally integrated broadband Internet access service that allows their customers the capability to freely access all lawful content, applications and services on the Internet, generate and transform content, exchange packets with other Internet users, and, since the inception of

a sound factual basis for its Title II reclassification and that restoring the information service classification is entirely proper. Furthermore, the Commission never had a sound legal or policy basis for reclassifying broadband Internet access as a common carrier telecommunications service in the first instance.[127] The decision ran directly contrary to a long line of Commission determinations establishing that, under the Act's service and technology-specific regulatory framework, ISPs were not, and should not be treated as, providers of "telecommunications service."

A. The Text and Structure of the Act Together with Commission Precedent Support Classifying Broadband Internet Access Service as an Information Service.

ACA agrees with the NPRM's conclusion that broadband Internet access service fits comfortably within the statutory definition of "information service" because what ISPs are offering broadband Internet users goes "beyond mere transmission" and necessarily includes the functionalities that define an information service.[128] As the NPRM notes, the text, structure and Commission precedent all support an information service classification for broadband Internet access service based on the capabilities the service offers to consumers.

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service, have made no fundamental changes in the functionalities offered to consumers. *See, e.g.*, Sjoberg Declaration, ¶ 4; Kyle Declaration, ¶ 5; Hickle Declaration, ¶ 6. ACA members also affirmed that they had not fundamentally changed the way in which they advertise their broadband Internet access service – they have always emphasized both its enhanced functionalities and fast speeds, indicating that any greater emphasis on speed in recent years was a reflection of the public's growing understanding of the service and the faster speeds their networks could obtain. *See, e.g.*, Timcoe Declaration, ¶ 6; Lynch Declaration, ¶ 5.

[127] This decision was upheld as "reasonable" through the exercise of extreme deference under the *Chevron* doctrine by the D.C. Circuit in *USTelecom v. FCC*. That the Title II decision was found permissible by the court does not necessarily mean that it was either the best reading of the statute, correct or wise.

[128] NPRM, ¶¶ 27-29.

1. The statutory definitions support an information service classification for broadband Internet access service.

As the Commission has recognized, all regulatory consequences flow from the Act's definitions.[129] Regulatory classification must, therefore, proceed from the standpoint of what regulatory or de-regulatory framework Congress intended for each type of wire or radio communications service, including Internet access.[130] Although Congress included the category of information service in the Act's definitions, thus extending to the Commission subject matter jurisdiction over information services under Title I,[131] it created no concomitant "Title [X]" laying out the manner which the Commission was to regulate information services, strongly suggesting that they, like the enhanced services before them, were to be subject to a minimal regulatory environment.[132]

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[129] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 21 (1998) ("Stevens Report"); *see also* Barbara Esbin, OPP Working Paper Series No. 30, "Internet Over Cable: Defining the Future In Terms of the Past," (1998) ("Internet Over Cable") (examining the regulatory consequences of the definitions added to the Communications Act of 1934 or changed by the 1996 Act with respect to the regulatory classification of broadband Internet access service). The specific definitional categories at issue with respect to the appropriate regulatory classification of broadband Internet access service – "telecommunications," "telecommunications service" and "information service" – were added by the 1996 Act. The definitions incorporated, as the NPRM notes, the approach taken by the Commission in its *Computer Inquiry* line of decisions distinguishing "basic services," which were the offering of a transmission path virtually transparent in its interaction with user-supplied data and subject to Title II common carrier regulation, and "enhanced services," which involved information storage, protocol conversion and computer processing, which were not. NPRM, ¶ 41; Stevens Report, ¶ 42. *See also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967, 975-77 (2005) ("Brand X") (finding the definitions of the terms "telecommunications service" and "information service" established by the 1996 Act to be similar to the Computer II "basic" and "enhanced" service classifications).

[130] The 1996 Act defines the term "Internet" as "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(e)(1). It defines the term "interactive computer service" to mean, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational systems." 47 U.S.C. § 230(e)(2).

[131] The courts have recognized that although Congress granted the Commission no direct regulatory authority over Internet services, the Commission nonetheless has Title I "ancillary jurisdiction" that it may exercise when two conditions are met: (i) the matter falls within the Commission's delegated authority over the subject in Title I, and (ii) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. Comcast Corp. v. FCC, 600 F.3d 642, 645-646 (D.C. Cir. 2010).

[132] *See* Sekhar v. United States, 133 S. Ct. 2720, 2724 (2013) ("[I]f a word is obviously transplanted from another legal source . . . it brings the old soil.").

ACA agrees with the NPRM's conclusion that, consistent with the terms of the information service definition, "Internet service providers offer the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'"[133] As Judge Brown observed in her dissent from the D.C. Circuit's denial of petitioner's request for *en banc* rehearing of the panel decision in *USTelecom v. FCC*:

> Unsurprisingly, the Act's definition of "information service" fits broadband Internet access like a glove. "[G]enerating, acquiring, storing," or "making available information via telecommunications" is what users do on social media websites like Facebook…. "[T]ransforming" or "utilizing" "information via telecommunications" is what users do on YouTube…. "[A]cquiring, storing" and "retrieving … information via telecommunications" is what users do with email…. The "offering of a capability" for engaging in all of these activities is exactly what is provided by broadband Internet access.[134]

This cogent interpretation is consistent with the functionalities broadband Internet access service offers subscribers and decades of Commission interpretation and precedent prior to 2015, as discussed below.

2. Commission precedent supports an information service classification for broadband Internet access service.

As the NPRM observes, beginning shortly after enactment of the 1996 Act and lasting until 2015, a bipartisan consensus led to six separate Commission decisions confirming that Internet access fit within the statutory definition of an information service, subject to Title I.[135]

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[133] That is, the essence of what broadband Internet access offers consumers is access to data stored on computers and the capability for interacting with and manipulating that data stored on remote computers by the ISP or other Internet actors. NPRM, ¶ 27.

[134] *USTelecom*, 825 F.3d 674, *reh'g en banc denied*, No. 15-1063, 2017 WL 154517, at *5 (D.C. Cir. May 1, 2017) (Brown, J., dissenting from the denial of rehearing *en banc*) ("Brown Dissent"). Judge Brown's observation mirrors that of the Commission shortly after passage of the 1996 Act: "Internet access providers typically provide their subscribers the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic email clients, Telnet applications, and others. When subscribers store files on Internet service provider computers to establish 'home pages' on the World Wide Web, they are, without question, utilizing the provider's 'capability for . . . storing . . . or making available information' to others." Stevens Report, ¶ 76.

[135] NPRM, ¶ 38; Stevens Report, ¶ 3 (Internet access is an information service); *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 2, 7 (2002) ("Cable

Further, that while an information service uses "telecommunications" to provide Internet access, there is no standalone offering by an ISP of "telecommunications service."[136] ACA agrees that these decisions were correct and that the Commission, twenty years later, "should be reluctant to second-guess the interpretations of those more likely to understand the contemporary meaning of the terms of the Telecommunications Act."[137]

Each of the Commission's examinations of the appropriate regulatory classification of Internet access service have considered the terms of the statutory definitions together with the factual particulars of how broadband Internet access service was provisioned and offered to subscribers, and on that basis classified Internet access service providers, regardless of platform, as "information service" providers under Title I of the Act.[138] These decisions – the

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Modem Declaratory Ruling") (broadband Internet access over cable is an information service); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14862, ¶ 12 (2005) ("Wireline Broadband Order") (wireline broadband Internet access service is an information service); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service,* Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶ 9 (2006) ("Broadband Over Power Line Order") (broadband service over power lines is an information service); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶¶ 18, 22–26 (2007) ("Wireless Broadband Declaratory Ruling") (wireless broadband Internet access is an information service); 2010 Open Internet Order, ¶¶ 47-48 (continuing to treat broadband Internet access service as an information service and declining to reclassify it as a Title II telecommunications service).

[136] That is, a "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *See, e.g.*, Stevens Report, ¶ 76; Cable Modem Declaratory Ruling, ¶ 38.

[137] NPRM, ¶ 39.

[138] Stevens Report, ¶ 76 (finding that under the Communication Act's service and technology-specific framework Internet service providers were not providing consumers a pure transmission path, were not offering service on a common carrier basis, and therefore should not be treated as providers of a telecommunications service, was subsequently extended to broadband Internet access service providers in a series of four separate orders).

Cable Modem Declaratory Ruling, the Wireline Broadband Order, the *BPL-Enabled Broadband Order*, and the *Wireless Broadband Declaratory Ruling*[139] – were not based on the Commission's discretion as a policymaker, although its policy objectives were certainly taken into account at the time.[140] The key to the Commission's decisions classifying broadband Internet access service as an information service were its determinations, in each case, that although broadband Internet access contained a "telecommunications" component – "via telecommunications" being part of the definition – the providers were *not offering* telecommunications service to the public for a fee, either in combination with an information service or solely as a transmission service.[141]

The Supreme Court in *Brand X*, finding the statutory definition of telecommunications service ambiguous, upheld the Commission's decision that the cable modem service was an integrated information service.[142] The court, focusing on the functions broadband providers

[139] In each of these rulings, the Commission concluded that broadband Internet access service better fit the statutory definition of an "information service" than a "telecommunications service," based on the nature of the functions the end user is offered and regardless of the underlying technology (cable modem, wireline broadband internet access, broadband over power line Internet access, or wireless broadband Internet access services). Cable Modem Declaratory Ruling, ¶ 2; Wireline Broadband Order, ¶ 12; Broadband Over Power Line Order, ¶ 9; Wireless Broadband Declaratory Ruling, ¶ 18.

[140] The legal question in each case turned on whether broadband Internet access simply provides a mechanism for transmitting user-generated content without modification – a pure transmission capability like traditional telephone service – or whether it functionally integrates the ability to generate, acquire, store, transform, process, retrieve and/or utilize data by offering, for example, personalized settings, ISP-provided e-mail, content storage, and security functions.

[141] In each case, the Commission concluded that a consumer cannot purchase broadband Internet access service without also purchasing a connection to the Internet, that the transmission always occurs in connection with the information processing, and that such broadband Internet access provided on a functionally integrated basis – *i.e.,* where the transport, data processing and content elements of the end user service were "inextricably intertwined"– should not be treated as a telecommunications service. *See, e.g.*, Cable Modem Declaratory Ruling, ¶¶ 36, 38; Wireline Broadband Order, ¶ 9.

[142] Specifically, the court in *Brand X* focused on the "factual particulars of how Internet technology works and how it is provided." It reasoned that "[b]ecause the term 'offer' can sometimes refer to a single, finished product and sometimes to the 'individual components in a package being offered' (depending on whether the components 'still possess sufficient identity to be described as separate objects,' . . . the statue fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission, not by warring analogies." *Brand X*, 545 U.S. at 990-992.

offered to end users, agreed with these conclusions and analysis, and found that broadband Internet access service provided over a cable modem was an information service, that a user of the service "cannot reach a third-party without DNS functionality" and that "the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or 'cache,' popular content on local computer servers."[143] In short, "'[t]he service that internet access providers offer to members of the public is internet access,' not a transparent ability (from the end user's perspective) to transmit information."[144]

The Commission found not only that the service characteristics best fit within the definition of information services, but also that sufficient actual and planned market entry would ensure that consumers were protected such that it *need not* regulate the services under the more restrictive framework of Title II.[145] By employing a narrow definition of basic service in the Computer II Final Decision – *i.e.*, *anything* more than basic is enhanced – and recognizing that basic and enhanced were non-overlapping categories, the Commission avoided the imposition of unnecessary and potentially counterproductive common carrier regulation on interactive data processing services that utilized transmission to enable end users to access and interact with

[143] *Id*. at 979, 999-1000. *See also id.* at 988 ("[s]een from the consumer's point of view … cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access."). The contested issue before the court was whether, in addition, the cable modem service also contained an offering of telecommunications to consumers for a fee – in other words, a "telecommunications service" – or solely comprised an integrated information service. *See id*. at 987-992.

[144] *Id*. at 1000. The Commission in 2005 subsequently found that wireline broadband Internet access service too "is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service," *i.e.*, an information service. Wireline Broadband Order, ¶ 12.

[145] Cable Modem Declaratory Ruling, ¶ 73. These rulings were consistent with over 30 years of FCC precedent separating "enhanced" from "basic" services, with only the latter regulated on a common carrier basis, that was incorporated by Congress into the Act when it added the statutory definitions of "information service" and "telecommunications service." NPRM, ¶ 34. *See also* Stevens Report; *USTelecom*, Brown Dissent at *20.

information stored on remote computers.[146] Congress followed suit by codifying this fundamental approach in the 1996 Act, and the Commission, consistent with this understanding, had *never* treated Internet service providers as common carriers before 2015. The Commission has always treated Internet service providers as "enhanced" or "information service" providers not subject to Title II regulation.[147]

Thus, the Commission has previously and accurately described "Internet access service" as a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and to access web pages and newsgroups.[148] More specifically, it has found wireline broadband Internet access service, like cable modem service, to be "a functionally integrated, finished service that inextricably intertwines information-processing capabilities with

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[146] In distinguishing between regulated "basic service" and unregulated "enhanced service," the Commission, in its foundational Computer II Final Decision, stated that "[a] basic transmission service is one that is limited to the common carrier offering of transmission capacity," whereas "[a]n enhanced services is any offering over the telecommunications network which is more than a basic transmission service." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision 77 F.C.C.2d 384, ¶¶ 93, 97 (1980) ("Computer II Final Decision"). The Commission explained that it had tried to draw the line "in a manner which distinguishes wholly traditional common carrier activities, regulable under Title II of the Act, from historically and functionally competitive activities not congruent with the Act's traditional forms," and that while it recognized "the existence of a communications component" in basic service and that "some enhanced services may do some of the things that regulated services did in the past," there was also a substantial data processing component in all of the enhanced services which the Commission had never subjected to common carrier regulation. *See id.*, ¶ 131.

[147] Congress codified this approach in the Telecommunications Act of 1996 when it created the statutory definitions of "information service" and "telecommunications service." Not only has the Commission declined to treat ISPs as common carriers, the courts have as well. *See, e.g.*, Howard v. AOL, 208 F.3d 741, 753 (9th Cir. 2000) (quoting the Stevens Report that "'[t]he service that Internet access providers offer to members of the public is Internet access,'" and agreeing with the FCC's analysis that because hybrid services like those offered by AOL that include email and similar offerings – including "chat rooms" that are under AOL's control that may be reformatted or edited – and accessed by its subscribers are information or enhanced services, "AOL does not act as a mere conduit for information").

[148] *See* Wireline Broadband Order, ¶ 14; Cable Modem Declaratory Ruling, ¶ 36; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3027-28, ¶ 14 (2002) ("Wireline Broadband NPRM") (*citing* Stevens Report, ¶ 33 (Internet access services are services that "alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.")); *see also* 47 U.S.C. § 231(e)(4); Reno v. American Civil Liberties Union, 521 U.S. 844, 851 (1997).

data transmission such that the consumer always uses them as a unitary service."[149] It found that these services enabled an end user to retrieve files from the World Wide Web, such that the end user has the capability to interact with information stored on the service provider's facilities.[150] On this basis, the Commission has found that providers of broadband Internet access service offer subscribers many forms of functionality and services, together with the ability to run a variety of applications, intrinsic to the provision of broadband Internet access services that go well beyond simple packet transport and fit within the characteristics stated in the information service definition.[151]

The Commission's original classification of broadband Internet access as an information service, and its subsequent decisions confirming that classification, were well-founded in the factual particulars of how the service is provided and the enhanced capabilities it affords consumers to access and interact with Internet content, applications and services.[152] This was

[149] Wireline Broadband Order, ¶ 9, *citing* Cable Modem Declaratory Ruling, ¶ 38. That is, the transmission component of wireline broadband Internet access service is "'part and parcel' of [that service] and is integral to [that service's] other capabilities." *Brand X*, 545 U.S. at 988, *quoting* Cable Modem Declaratory Ruling, ¶ 39. The same findings were later made with respect to wireless broadband and broadband over power line. *See supra,* note 139.

[150] Wireline Broadband Order, ¶ 9. Moreover, "to the extent a provider offers end users a capability to store files on the service provider's computers to establish 'home pages,' the consumer is utilizing the 'capability for . . . storing . . . or making available information.'" *Id.*

[151] *See, e.g.*, Cable Modem Declaratory Ruling, ¶¶ 10, 16-17, 35-38; Wireline Broadband Order, ¶¶ 9, 13-15.

[152] The 2015 Open Internet Order rejected this analysis, citing purported changes in broadband providers' marketing and pricing strategies and its view that DNS and caching used in broadband Internet access service fell within the exception for telecommunications system management to the definition of an information service. 2015 Open Internet Order, ¶¶ 330, 366. The NPRM asks whether these determinations were well founded or should be reconsidered. NPRM, ¶¶ 36-37. ACA addresses the marketing issue below. DNS provides the processing capabilities that allow consumers to visit a website without knowing its IP address, and thereafter to "click through" a link on that website to other websites, and enables other capabilities that allow a subscriber to manipulate information or that provide information directly to consumers. In the Cable Modem Declaratory Ruling, the Commission recognized DNS and caching as integral features of the information service cable modem providers offered consumers. It found that DNS "constitute[d] a general purpose information processing and retrieval capability that facilitates use of the Internet in many ways." Cable Modem Declaratory Ruling, ¶¶ 36-38. Before the Supreme Court, the Commission argued that DNS and caching did not fall within the narrow statutory exclusion for telecommunications management and were not sued for the "management, control or operation" of a telecommunications network; rather they provide "information-processing capabilities . . . used to facilitate information retrieval capabilities that are inherent in Internet access." *See* Reply Brief

true in 2002, as it was in 2005, and has remained true ever since. For all these reasons, ACA agrees with the NPRM's conclusion that classifying broadband Internet access as an information service was, and remains, "the better reading of the statute."[153]

3. The factual particulars of how broadband Internet access service is offered and provided have remained constant since inception of the service and support an information service classification.

As ACA noted in its 2014 Open Internet Comments, since those earlier decisions, broadband access services have only become more capable and the range of services broader (*e.g.*, including home monitoring, specialized content, and additional roaming services).[154]

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for Federal Petitioners at 6, n.2, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (No. 04-277), 2005 WL 640965. In *Brand X*, the Supreme Court upheld that determination as reasonable. *Brand X*, 545 U.S. at 987-88. The Commission today is correct to reconsider the 2015 Open Internet Order's questionable conclusion, grounded on the observation that third parties also provide DNS and caching, to the contrary. NPRM, ¶ 37. The fact that third parties could provide DNS and caching was also true in 2005, but more importantly, it is irrelevant to the question whether these capabilities manage a telecommunications system, which the exception requires, or are of use to subscribers in accessing the Internet. *See* Letter from Cassio Sampaio, Vice President, Marketing, Sandvine, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108 (filed Jul. 14, 2017) (DNS is an integral part of an ISP's provision of broadband Internet access service and is not, as the Commission had previously found, used solely for management, control or operation of a telecommunications service; DNS involves generating, acquiring, storing, transforming, and processing queries to Internet servers and making available information stored in the DNS, "a globally distributed database system that stores a variety of information from email servers to web servers and "is a function that useful, necessary, and essential to end users being able to use the Internet as it exists today").

[153] NPRM, ¶ 54.

[154] ACA 2014 Open Internet Comments at 60. In support of its filing, ACA submitted a paper by Dr. William Lehr. *See* Lehr Paper, Section 5, Addressing Edge Provider Threats is Important to Protect Internet Openness, at 11. In his paper, Dr. Lehr explained: When mass-market consumers purchase broadband Internet access they are purchasing a bundle of functionalities that allow them to exchange packets with other end hosts, whether those are with other end users or edge providers (e.g., content on a website) and wherever those hosts are located (whether on the same sub-net or across the globe). This includes the necessary packet transport and routing functionality that is intrinsic to the Internet's role as a data communications network as well as a range of other functions and services such as email, news group access, Web access, and various network monitoring and traffic management features (e.g., SPAM and parental filters, virus scanning, etc.). Fundamentally, broadband access service includes the ability of end-users to access (use) popular content, applications, and devices as part of the broadband Internet experience. Over time, as the capabilities of applications, devices, and ISP services, including broadband access, have improved and new services have emerged (e.g., more support for real-time multimedia, new offerings for home sensor management, etc.), the scope of services that are included in broadband access have expanded. The demand for broadband Internet access services is inextricably linked to the demand for all of its components since broadband access is only valuable when used in conjunction with other communications goods and services supported in the ecosystem."). ACA requests the Commission to take administrative notice of this filing and incorporate it into the record in this docket.

Contemporaneous statements from ACA members confirmed that, "with the exception of increasing the speed of their mass-market Internet access offerings, they are doing nothing different today than they were at the inception of their service offerings."[155] The determination in the 2015 Open Internet Order that broadband ISPs were actually providing two services – an offering of a transparent high-speed transmission service and a separate offering of Internet "capabilities that would otherwise fall within the information service definition" but did "not turn broadband Internet access service into a functionally integrated information service,"[156] was not only inconsistent with the Commission's prior determinations that information service and telecommunications service are "mutually exclusive"[157] – that is, either fell into one category or the other but not both – it was simply wrong.

Consistent with these precedents, the NPRM posits that what ISPs are offering is "the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,'" when they give broadband Internet users the "capability," inter alia, to post on social media, read a newspaper's website or browse results from a search engine.[158] That is, broadband Internet access is by definition an information service because it offers its users the "capability" to perform every one of the functions listed in the definition. ACA agrees. Regardless of whether each broadband Internet user utilizes each and every one of the functionalities listed, the ISP affords its customers the

[155] ACA 2014 Open Internet Comments at 60; ACA 2014 Open Internet Comments, Declaration of Edward McKay, Vice President of Wireline and Engineering, Shenandoah Telecommunications Company, ¶ 4 (Attached to ACA 2014 Open Internet Comments as Exhibit C); ACA 2014 Open Internet Comments, Declaration of Christian Hilliard, Chief Executive Officer, USA Communications, ¶¶ 2-4 (Attached to ACA 2014 Open Internet Comments as Exhibit D).

[156] 2015 Open Internet Order, ¶ 365.

[157] *See* NPRM, ¶ 40; 2015 Open Internet Order, ¶¶ 47-48 (accepting previous findings of mutual exclusivity); Stevens Report, ¶ 13 (concluding that the categories of "telecommunications service" and "information service" are mutually exclusive).

[158] NPRM, ¶ 27.

capability for executing these functions via telecommunications.[159] Moreover, as ACA has previously observed, broadband ISPs have continued to offer and provide the same essential functionalities that they were offering when the Commission had analyzed the matter from 2002 through 2010, albeit at substantially faster speeds.[160] In fact, broadband ISPs were offering even more enhanced functionalities as the network and data security and safety needs of broadband consumers and networks have grown and demand for expanded options for personal data storage, media messaging or WiFi roaming capabilities has grown.[161] Then, as today, ACA members offer far more than a transparent transmission path when they offer broadband Internet access service to consumers. What they offer is "Internet access," which, in turn, is precisely what "makes the service capable of 'generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information' to consumers," as the NPRM observes.[162]

ACA members again confirm that the factual particulars of the broadband Internet access service they are offering today, with the exception of increased speed, reliability and functionality, have not changed in any significant way since the inception of the service.[163] They offer a single, integrated information service via telecommunications to enable broadband Internet users to utilize each of the functionalities described in the definition of information service, and to reach all Internet end-points, and neither market nor provide the bundle of

[159] The fact that broadband Internet users "'obtain many functions from companies' other than their Internet service provider," as the NPRM notes, is as true today as it was in 2002 and 2013 and does not alter the fact that the ISP's own offering makes these functionalities available – or capable of use by subscribers and is not determinative of its regulatory status.

[160] ACA 2014 Open Internet Comments at 57.

[161] *Id*. at 57-58, *citing* Lehr Paper at 10 & n.18 (providing, for example, filtering for malware, policy-based routing).

[162] NPRM, ¶ 28.

[163] *See* Timcoe Declaration, ¶ 6; Lynch Declaration, ¶ 5; Hickle Declaration, ¶ 6; Sjoberg Declaration, ¶ 4; Kyle Declaration, ¶ 5.

functionalities or the transmission capability without the other, nor provide and charge for two separate services.[164]

The NPRM also asks whether ISPs' marketing has decidedly changed in recent decades and the relevance of marketing to determine whether broadband Internet end users are receiving the capabilities of an information service or the mere transmission between points of a user's choosing of a telecommunications service.[165] ACA members confirm that their marketing of broadband Internet access service has not undergone substantial change since the inception of the service and that it has always emphasized both the always-on capabilities that broadband Internet access would afford subscribers, including the ability to retrieve and utilize the panoply of available Internet content and applications, and the fast speeds at which they would be able to stream, download and upload Internet content.[166] Members indicate further that to the extent recent marketing may place a greater emphasis on speed, it is responding to increased consumer familiarity with the capabilities offered by broadband Internet access by focusing on features that distinguish one provider from another, such as faster speeds, greater network reliability and performance.[167]

It is therefore evident that the factual particulars of how broadband Internet access service is offered and provided have remained constant since inception of the service and support restoration of an information service classification.

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[164] Timcoe Declaration, ¶ 6; Lynch Declaration, ¶ 5; Hickle Declaration, ¶ 6; Sjoberg Declaration, ¶ 4; Kyle Declaration, ¶ 5.

[165] NPRM, ¶ 36. The NPRM notes that the 2015 Open Internet Order had relied on changes in the way broadband ISPs were marketing and pricing their services to conclude that what was being offered was "a certain level of transmission capability – measured in terms of 'speed' or 'reliability'" "in exchange for the subscription fee, even if complementary services are also included as part of the offer." *Id*.; 2015 Open Internet Order, ¶ 354.

[166] Timcoe Declaration, ¶ 6; Lynch Declaration, ¶ 5; Hickle Declaration, ¶ 6; Sjoberg Declaration, ¶ 5; Kyle Declaration, ¶ 5.

[167] Timcoe Declaration, ¶ 6; Lynch Declaration, ¶ 5; Hickle Declaration, ¶ 6; Sjoberg Declaration, ¶ 5; Kyle Declaration, ¶ 5.

4. Other provisions of the Act as well as its structure confirm the appropriateness of an information service classification for broadband Internet access.

The operative provisions of the 1996 Act dealt with the Internet itself in fairly limited ways.[168] The general approach to the Internet in the 1996 Act, reflected in its definitions and policy statements, was that computer networks, interactive computer services, web pages and online services comprised a market that was sufficiently competitive so that federal regulatory intervention was both unnecessary and undesirable.[169] The NPRM posits that Sections 230 and 231 confirm the analysis that broadband Internet access service should be classified as information service and not telecommunications service and seeks comment on this view.[170] ACA agrees. Not only does the plain language of these contemporaneous provisions strongly indicate an information service classification for broadband Internet access service, the legislative history of these provisions lends further support to the Commission's analysis.

Section 230 was enacted together with the definitions of information and telecommunications service in the 1996 Act and confirms that Congress understood Internet access to be an information service immune from common carrier regulation.[171] Section 231,

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[168] *See* Kennard Legg Mason Remarks ("the debate on the Telecommunications Act of 1996 took place at a time when the Internet was only just beginning to emerge as a phenomenon in telecommunications" and the "principle debate about the Telecom Act as about how to promote competition on the analog network: local and long distance" telephone services").

[169] *See* 47 U.S.C. § 230(b) (it is the policy of the United States "to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); Esbin, *Internet Over Cable* at 22-25 (discussing Congressional attempts at the time of the 1996 Act to regulate interactive computer services involving the presentation of indecent material to minors that included defenses to alleged violations of the Communications Decency Act in Section 223(e)(6) which explicitly disclaimed any construction of the provision to "treat interactive computer services as common carriers or telecommunications carriers").

[170] NPRM, ¶¶ 31-32.

[171] As the NPRM notes, the plain language of the definition of interactive computer service "deems Internet access service an information service," by using the terms "'any information service, system, or access software provider that provides access to the Internet….'" *Id*., ¶ 31. Section 230(f)(2) defines "interactive computer services" to include any "information service,… including specifically a service … that provides access to the Internet." 47 U.S.C. § 230(f)(2).

added a year later, makes the case even more strongly, as the NPRM observes, that Congress did not intend to have Internet access service treated as a telecommunications service by defining Internet access service as a service, similar to an information service, "enabl[ing] users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."[172] These classifications, made contemporaneously with the addition to the Act of the definitions of "information service" and "telecommunications service," are clear in import, should be accorded great weight by the Commission, and conclusively support an information service classification for broadband Internet access service. They further underscore that the purposes of the Telecommunications Act are better served by classifying broadband Internet access service as an information service, as the NPRM makes clear.[173]

The legislative history of Section 230 lends additional support to the view that Congress did not intend the Commission to subject Internet access service to common carrier regulation under Title II.[174] Not only did the drafters of Section 230 "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet,"[175] they gave the Commission no express role in implementing its provisions.[176] It is hard to reconcile this legislative history

[172] NPRM, ¶ 32; 47 U.S.C. § 231(e)(4).

[173] NPRM, ¶ 34.

[174] *See* 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("Rep. Cox Statement"). The primary object of the statute is to establish civil immunity from damages for "good Samaritan" blocking and screening of offensive material provided over the Internet by another information content provider, without the need for additional regulatory involvement in Internet content regulation. Section 230(c) and (d) implement the policies contained in subsection (b) by means of limiting Internet service provider liability for third party content and requiring providers to disclose to users the existence of available parental controls, not by regulating the network management practices of Internet service providers.

[175] *Id*.

[176] To the extent that Section 230 speaks to any regulatory mandate for the Commission, it is solely to preclude the agency – or anyone else – from treating "the provider or user of an interactive computer

with a conclusion that the same Congress that enacted Section 230 intended the Commission to classify broadband Internet access service, an information service included under the definition of an "interactive computer service" that was to be left "unfettered" by regulation, as a telecommunications service subject to common carrier regulation under Title II.[177]

ACA agrees with the Commission's observation that the significant forbearance the Commission granted in the 2015 Open Internet Order demonstrates that the structure of Title II, with its highly prescriptive regulatory framework, is a poor fit for the dynamic broadband Internet access service marketplace.[178] At the time Congress added the definitions in question to the Communications Act in 1996, its goal was not to create an expansive regulatory regime for the Internet that could then be eased by the exercise of Section 10 forbearance, but rather to encourage rapid broadband deployment,[179] a goal the imposition of utility-style Title II regulation would be unlikely to achieve. The fact that the Commission found the need to exercise forbearance either permanently or temporarily from over 30 provisions of Title II to craft, as it said, "a Title II tailored to the 21st century," should have been taken as sign that it was headed down a radically wrong path that was not reasonably contemplated by Congress.[180]

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service as the publisher or speaker of any information provide by another information content provider." 47 U.S.C. § 230(c)(1).

[177] Even assuming, as the D.C. Circuit found, that the Commission's 2015 interpretation that the enhanced capabilities of broadband Internet access service fit within the "telecommunications management exception" to the definition of an information service was a permissible interpretation, it was certainly not the best. *USTelecom*, 825 F.3d at 705.

[178] NPRM, ¶ 33.

[179] As the preamble to the Telecommunications Act of 1996 makes plain, Congress sought to "reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1996).

[180] ACA acknowledges that this use of forbearance was upheld against challenge as a reasonable exercise of the powers delegated by Congress to the Commission by the panel in *USTelecom*. *USTelecom*, 825 F.3d at 726-731. But the larger issue not addressed by the panel majority was whether Congress intended the provision to be used, not as a "tool for lessening common carrier regulation," but for expanding it, as it did in the 2015 Open Internet Order. *See USTelecom*, Brown Dissent at *5-6; 2015 Open Internet Order ¶¶ 434-542 (imposing common carrier status but recognizing vast portions of Title II and the Commission's implementing regulations were a poor fit for broadband Internet access and accordingly granting substantial forbearance to achieve the Commission's broadband policy objectives). It defies reason to believe that the same Congress that recognized Internet access service to be an

Administrative agencies like the Commission are charged with implementing, not rewriting, legislative directives to achieve their own policy preferences.[181] Crafting a "Title II tailored to the 21st century" is manifestly a legislative task for our elected representatives in Congress to execute, not the appointed members of the Commission.

B. The Commission Has the Legal Authority to Classify Broadband Internet Access Service as an Information Service.

In *Brand X*, the Supreme Court upheld the Commission's authority to determine the appropriate regulatory classification for broadband Internet access service given ambiguities in the Act's definitions under the *Chevron* doctrine.[182] Whereas the Supreme Court upheld the Commission's 2002 decision to classify broadband Internet access as an integrated information service, the D.C. Circuit upheld the Commission's 2015 decision to reclassify broadband Internet access as a telecommunications service.[183] Neither questioned whether Congress had

"interactive computer service," like an information service, that was to remain unfettered by Federal and state regulation also granted the Commission the authority to effectively write its own new "Title II," through the combination of the imposition of common carrier status and massive forbearance, a decision that established the nature and degree of common carrier regulation to be imposed for the first time on broadband Internet access without any further legislative input. In his dissent to *Brand X*, Justice Scalia called out the ease with which "an experienced agency can (with some assistance from credulous courts)" "turn statutory constraints into bureaucratic discretions." *See Brand X*, 545 U.S. at 1013-1014 (Scalia, J., dissenting). The Justice was referring to the decision of the Commission in the Cable Modem Declaratory Ruling, first having rejected the telecommunications service classification and chosen instead to classify the cable modem service as an information service, then seeking comment on whether it should use its ancillary jurisdiction to require cable companies to "unbundle" the telecommunications component of cable modem service. As Justice Scalia noted, "presto, Title II will apply to them, because they will finally be offering telecommunications service," giving the Commission the power to then exercise its Section 10 forbearance authority, which the Commission had already tentatively concluded it would do. He criticized this "mobius-strip reasoning that mocks the principle that the statute constrains the agency in any meaningful way," turning "statutory constraints into bureaucratic discretions." *Id*. at 1014; Cable Modem Declaratory Ruling, ¶¶ 94-95. In the 2015 Open Internet Order, the Commission similarly turned the small-scale bureaucratic discretion to forbear in markets where common carrier regulation is shown to be unnecessary into a large-scale legislative mandate to "create a Title II tailored for the 21st century," similarly mocking the "principle that the statute constrains the agency in any meaningful way." 2015 Open Internet Order, ¶ 5.

[181] *See, e.g.*, Util. Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2442 (2014) ("[A]n agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole," does not merit deference.").

[182] *Brand X*, 545 U.S. at 980.

[183] *USTelecom*, 825 F.3d at 700.

left the question of appropriate regulatory classification to the Commission in the first instance, and the Commission is therefore acting well within its authority to consider the matter anew.

The D.C. Circuit's decision in *US Telecom* upholding the Commission's 2015 Open Internet Order again reinforces the Commission's authority to both choose the appropriate classification for broadband Internet access services, as well as reconsider previous classification decisions. The courts in both *Brand X* and *USTelecom* confirmed that the statute is ambiguous regarding the proper classification of broadband Internet access service and employed well-established administrative law doctrine to determine whether the agency's various interpretations adhered to that case law.[184]

It is well settled that administrative agencies may revisit prior decisions and change their regulatory policies concerning how they will implement statutory mandates, but the courts require that they acknowledge the change and explain their reasoning, and that the decisions are neither "arbitrary" nor "capricious" in making the change. Under the Supreme Court ruling in *FCC v. Fox Television Stations*, to pass this test, the Commission must acknowledge that it is changing its policy, provide a reasoned basis for the change, and take account of reliance interests stemming from the earlier policy.[185] As the NPRM notes, in upholding the Commission's decision to reclassify broadband Internet access service as a Title II telecommunications service, the D.C. Circuit applied a "highly deferential standard" to the Commission's predictive judgments regarding the investment effects of reclassification, and

[184] *See USTelecom*, 825 F.3d at 701-04 (holding that *Brand X* established that the Communications Act is ambiguous with respect to the proper classification of broadband, and that statutory ambiguity give the Commission authority to regulate broadband service as either a telecommunications or an information service).

[185] FCC v. Fox TV Stations, Inc., 556 U.S. 502 (2009) ("Fox"). According to *Fox*, "it is not that further justification is demanded by the mere fact of the policy change but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or engendered by the prior policy." *Id*. at 515-16.

deferred to the Commission's evaluation of market conditions supporting its rejection of ISPs' reliance interests in the prior classification.[186]

At the same time, the courts have acknowledged that should predictive judgments "prove erroneous, the Commission will need to reconsider" its actions "in accordance with its continuing obligation to practice reasoned decision-making."[187] ACA agrees with the Commission's conclusions that its previous predictions regarding broadband investment were erroneous and, as identified previously, ample evidence supports the Commission's reconsideration of its 2015 decision on this basis alone. For the reasons explained above in Section II, ACA wholeheartedly agrees with the Commission's assessment that the predictions and expectations reflected in the 2015 Open Internet Order on the lack of harm to ISPs, particularly smaller ISPs, and the operation of the marketplace "have not been borne out by subsequent events."[188]

IV. THE COMMISSION CAN ENSURE AN APPROPRIATE REGULATORY FRAMEWORK FOR BROADBAND INTERNET ACCESS SERVICE UNDER TITLE I OF THE ACT

ACA applauds the Commission's decision to explore anew methods for ensuring Internet freedom absent the classification of broadband Internet access service as Title II service. The Commission is on the right track in reevaluating the Commission's existing rules and enforcement regime to determine whether *ex ante* regulatory intervention in the market is necessary, and if so, determining whether and how the existing rules and enforcement regime should be modified or eliminated.[189] The Commission's proposed approach, including use of a cost-benefit analysis consistent with Executive Order 12866 and guidelines issued by the Office

[186] NPRM, ¶ 53; *USTelecom*, 825 F.3d at 707.

[187] NPRM, ¶ 53; Aeronautical Radio v. FCC, 928 F.2d 428, 445 (D.C. Cir. 1991).

[188] NPRM, ¶ 53.

[189] *Id*., ¶ 70.

of Management and Budget, is appropriate, and exactly the approach the Commission should have taken prior to adopting economic regulation in its 2015 Open Internet Order.[190]

ACA emphatically supports the Commission's proposed elimination of the Internet General Conduct standard.[191] The rule was not only ill-conceived and unnecessary, it was hopelessly vague and open-ended, leaving broadband ISPs guessing about what behaviors the Commission would find unacceptable after-the-fact, particularly regarding service terms and pricing.

ACA remains skeptical that the record will support retention of *ex ante* regulation of broadband ISPs, given the lack of evidence of any actual (as opposed to hypothetical) and widespread harm to either consumers or the Internet ecosystem resulting from ISPs network management practices or commercial terms. Nonetheless, should the Commission determine that the benefits of having enforceable Net Neutrality rules would outweigh their costs, it should fashion rules so that they apply to ISPs and Internet edge providers alike.

A. The Commission Should Eliminate the Internet General Conduct Standard.

The Commission's proposal to eliminate the Internet General Conduct Standard will provide welcome relief to smaller ISPs and should be adopted forthwith.[192] In addition to being ill-conceived, hopelessly vague and open-ended, the rule has been actively harmful to smaller ISPs who were left struggling to understand how it would apply to their prices and practices associated with broadband Internet access service. The standard, which was not proposed in the 2014 Open Internet NPRM, was added by the Commission as a catch-all safeguard giving it the ability, in the words of Chairman Wheeler, to referee the field and "throw the flag" if the

[190] *Id*., ¶¶ 104-114.

[191] *Id*., ¶¶ 72-74.

[192] *Id*., ¶ 72.

agency saw something it didn't like in the marketplace.[193] Not only is the standard based on a faulty "gatekeeper" premise, it is, as the NPRM notes, "premised on theoretical problems that will be adjudicated on an individual, case-by-case basis" and require ISPs to "guess at what they are permitted and not permitted to do."[194] The rule should be eliminated for two principle reasons: it is unnecessary, as smaller ISPs are not "gatekeepers," and because it establishes a standard that is "unknown and unknowable," that is particularly burdensome for smaller ISPs.[195]

First, the General Conduct standard should be eliminated because it's premised on the belief that Internet service providers are gatekeepers, and ACA members are not gatekeepers. The assumption underlying the standard, that a broadband ISP, regardless of market power or demonstrable ability to erect barriers between Internet edge providers and end users or otherwise harm the open Internet, can and will act as a "gatekeeper," and "actually chok[e] consumer demand for the very broadband product it can supply," was manifestly wrong when the rule was adopted and remains manifestly wrong today as applied to smaller ISPs.

In its 2014 Open Internet Comments, ACA provided data and analysis demonstrating that ACA member companies are incapable of disrupting the Internet "virtuous circle" posited by the Commission and adversely impacting broadband demand and deployment, unlike Internet

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[193] *See* 2015 Open Internet Order, Statement of Chairman Wheeler at 5916 ("The Order also includes a general conduct rule that can be used to stop new and novel threats to the Internet. That means there will be basic ground rules and a referee on the field to enforce them. If an action hurts consumers, competition or innovation, the FCC will have the authority to throw the flag."). Even the Chairman acknowledged that he did not know what behavior it would prohibit. Federal Communications Commission News Conference, C-SPAN (Feb. 26, 2015), *available at* https://www.c-span.org/video/?324473-3/fcc-news-conference-open-internet-rules. *See also* John Eggerton, *Wheeler on 'General Conduct Standard': Everybody into the Crucible,* BROADCASTING AND CABLE (Apr. 27, 2016), *available at* http://www.broadcastingcable.com/news/washington/wheeler-general-conduct-standard-everybody-crucible/155336 ("FCC Chairman Tom Wheeler says the goal of the Open Internet order's general conduct standard is not to be 'judgmental,' but instead elemental in the sense that it is meant to be a crucible to test and then arrive at what is in the public interest, which he defines as the common good….").

[194] NPRM, ¶ 74.

[195] Letter from William Bottiggi, General Manager, BELD Broadband, et al., to The Honorable Ajit Pai, Chairman, FCC, WC Docket No. 17-108, at 1-2 (filed May 11, 2017) ("19 Muni ISPs Member Letter").

edge giants such as Google, Amazon, Facebook and Netflix who escaped the reach of the Commission's rules.[196] That is, its members lack "gatekeeper" power vis-à-vis edge providers, even if they had the incentive to interfere with their customers' ability to enjoy the full panoply of Internet content, applications and services, which they decidedly do not. The Commission, in adopting the Internet General Conduct standard, as elsewhere in the 2015 Open Internet Order, simply ignored this evidence, leading it to draw incomplete and incorrect conclusions regarding the need to adopt the standard and apply it to smaller ISPs.[197]

Second, the rule should be eliminated because the Internet General Conduct standard is a costly regulation that is not outweighed by any countervailing benefits because smaller ISPs are not gatekeepers. The rule establishes a standard for behavior that virtually requires advice of counsel before a single decision is made, raising smaller ISPs costs as they struggle to understand its application to their service prices, terms, conditions, and practices and chilling their willingness to take the risk of introducing an innovative new feature or service and being judged in violation after the fact.

To "prohibit practices in the broadband Internet access provider's network that harm Internet openness," the 2015 Open Internet Order adopted a standard that prohibited ISPs from "unreasonably interfering with or unreasonably disadvantaging" the ability of end users to select, access and use broadband Internet access service and the ability of edge providers to make

[196] ACA 2014 Open Internet Comments at 6-25 (Internet edge providers have engaged in blocking and discrimination that is contrary to Internet openness and their exclusion from the scope of the Open Internet rules will undermine their effectiveness and cause distortions in a multi-sided Internet marketplace); Lehr Paper. *See also* ACA Feb. 2, 2015 Ex Parte at 3-4 (small ISPs lack the incentive and ability to harm edge providers); 43 Muni ISPs Member Letter at 1 (none of the smaller ISPs individually possess the market power to harm Internet edge providers); 59 Small ISPs Letter at 1 (small ISPs lack the incentive and ability to harm the openness of the Internet).

[197] A word search of the 2015 Open Internet Order reveals that the few references to anything that ACA filed in the record of the proceeding are confined entirely to ACA's position regarding the lack of need for the Commission to enhance its transparency disclosures and its failure to comply with the Regulatory Flexibility Act in assessing the costs and burdens of its proposals in its Initial Regulatory Flexibility Analysis. 2015 Open Internet Order, ¶¶ 24, 172-75, 177 (considering ACA arguments raised in the record concerning the burdens of the enhanced transparency requirements on smaller providers).

their offerings available to end users.[198] The Commission reasoned that the three "bright line" Net Neutrality prohibitions were necessary, but not sufficient, to protect against harms to the open Internet – both known and unknown – posed by broadband ISPs acting as "gatekeepers standing between edge providers and consumers."[199] In other words, the bright line rules were aimed at known harms ("known knowns"), whereas the Internet General Conduct standard was aimed at practices not yet known conclusively to harm Internet openness or are not yet seen in the marketplace ("known unknowns" and possibly "unknown unknowns").[200] The standard would "be applied on a case-by-case basis, considering the totality of the circumstances" surrounding a challenged practice.[201] Although the Order acknowledged that, "vague or unclear regulatory requirements could stymie rather than encourage innovation,"[202] the Commission failed to provide the kind of guidance of use to broadband ISPs, especially smaller ISPs lacking in-house counsel.

In practice, how the standard would apply to any given act or practice is both unknown and unknowable. None of the terms employed – "unreasonably," "interfere," "disadvantage" –

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[198] *Id*., ¶ 136.

[199] *Id*., ¶¶ 20, 135-136 ("Based on our findings that broadband providers have the incentive and ability to discriminate in their handling of network traffic in ways that can harm the virtuous cycle of innovation, increased end-user demand for broadband access, and increased investment in broadband network infrastructure and technologies, we conclude that a no-unreasonable interference/disadvantage standard to protect the open nature of the Internet is necessary.").

[200] *See* DOD News Briefing, Secretary of Defense Donald H. Rumsfeld (Feb. 12, 2002), *available at* http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636 ("Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones."). As then-Commissioner Pai noted in his dissent, "Even FCC leadership conceded that, with respect to the sorts of activities the Internet conduct standard could regulate, 'we don't really know' and that 'we don't know where things will go next' other than that the 'FCC will sit there as a referee and be able to throw the flag.'" 2015 Open Internet Order, Dissent of Commissioner Pai at 5924.

[201] 2015 Open Internet Order, ¶¶ 134-135, 138.

[202] *Id*., ¶ 138.

are anything more than "classic terms of degree" that failed to inform parties when they have crossed the line from permissible to prohibited.[203] To make matters worse, in its effort to provide some guidance regarding the application of this heretofore unheard of standard, the Commission identified a list of seven "non-exhaustive" factors by which it would assess challenged practices, including such open-ended factors of "free expression," "effect on innovation, investment or broadband deployment," and "empower meaningful consumer choice."[204] Not only was it unclear how the Commission would weigh the factors against one another, the Order made clear that other, yet-to-be-named factors may also be weighed in the balance by making the list non-exclusive.[205] At the same time, the Commission made clear that the standard would be used to evaluate usage allowances, sponsored data plans and data caps[206] – in other words, allow it to engage in after-the-fact rate regulation – and was in fact

[203] *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-49 (1991) (holding that a rule employing vague terms that have no settled usage or tradition of interpretation in law do not give adequate guidance as to what is prohibited). *See also* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012); Timpanaro v. SEC, 2 F.2d 453, 460 (D.C. Cir. 1993) (a rule that "fails to provide a person of ordinary intelligence fair notice of what is prohibited" and is "so standardless that it authorizes or encourages seriously discriminatory enforcement" is unlawfully vague). *See* Hickle Declaration, ¶ 9; Kyle Declaration, ¶ 8; Lynch Declaration, ¶ 7; Timcoe Declaration, ¶ 8; Sjoberg Declaration, ¶ 7 (terms such as "reasonable" and "interference" or "disadvantage" in the Internet General Conduct standard are vague and open to interpretation, which raises compliance costs).

[204] 2015 Open Internet Order, ¶¶139-145. The seven factors are: end-user control, competitive effects, consumer protection, effect on innovation, free expression, application agnostic and standard practices.

[205] At bottom, the Internet General Conduct standard, to the extent it even constitutes an actual standard, boils down to little more than a statement that "ISPs cannot harm consumers or edge providers." Although couched in terms of preventing competitive harms to Internet edge providers that provide Internet-delivered video services to broadband end users that may compete with a broadband ISP's own multichannel video programming distributor services or own over-the-top video offerings, the reach of the standard is far broader, preventing ISPs from making numerous routine decisions, at least not without consulting an attorney. For example, if an ISP improved its competing video service, that would benefit consumers, but arguably harm the competing edge provider. If the ISP raised prices for its' competing service, that would harm consumers, but benefit the competing edge provider. A rule loosely aimed at preventing harms to consumers or edge providers simply does not provide a workable standard.

[206] 2015 Open Internet Order, ¶¶ 151-153.

used in this fashion to investigate the data caps and zero-rating practices of several of the larger mobile broadband ISPs, as the NPRM observes.[207]

The Internet General Conduct standard is a costly regulation for smaller ISPs that is not outweighed by any countervailing societal or consumer benefit because these ISPs are not gatekeepers. The rule imposed both direct and indirect costs on smaller ISPs. Because the rule is so vague and open-ended, it required smaller ISPs to consult with counsel for both retrospective reviews of existing services and practices and prospective reviews of future plans to reduce the risk of Commission enforcement actions or consumer complaints. The addition of retrospective and prospective regulatory compliance reviews under the Internet General Conduct standard increased ACA members' legal and consulting costs, diverting scarce resources from service and network improvements.[208] In addition to the direct regulatory compliance costs, the rule imposed indirect costs, by causing smaller ISPs to forgo rolling out innovative new service features or pricing plans that would have benefited the ISPs and their customers alike. Smaller ISPs can't afford to be the subject of enforcement actions by the Commission or defend themselves before the Commission as a result of consumer complaints, because the costs of having to defend their actions before the Commission in Washington are enormous, relative to their resources. Given that the risks are high and many operators have their own "skin in the game" – including the mortgages on their own houses – smaller ISPs tend to err on the side of caution, even if that means depriving their customers and communities of

[207] NPRM, ¶ 74. As Mr. Sjoberg stated, just knowing that the Commission was investigating the data cap and pricing practices of the larger ISPs had a chilling effect on Sjoberg's willingness to use data caps and overage charges despite the costs imposed on the operator by forgoing their use. Sjoberg Declaration, ¶ 12. *See also* Kyle Declaration, ¶ 15; Hickle Declaration, ¶ 11.

[208] *See, e.g.*, Lynch Declaration, ¶ 8 ("We have limited resources, and the extra money spent on ongoing regulatory compliance as a result of the Title II decision is money that is not used for more productive purposes."); Kyle Declaration, ¶ 9 (an additional layer of legal review for services under the Internet Conduct Standard "adds to our cost of service and detracts from the resources we have available for service improvements and network expansion"); Hickle Declaration, ¶ 10 (new features and services reviewed under the Title II obligations and standards "imposed costs, and money spent on regulatory compliance is money taken away from putting fiber in the ground").

innovative features and services that would be highly beneficial and forgoing the increased revenues these offerings would provide.[209] These lost opportunity costs also weigh strongly against retention of the standard.

For all of the foregoing reasons, the Commission should eliminate the unjustified and costly Internet General Conduct standard.

B. The Commission Should Carefully Evaluate the Need for *Ex Ante* Rules and Consider All Reasonable Options for Preserving Internet Freedom.

ACA commends the Commission for now asking precisely the right kinds of questions concerning the Internet marketplace and how best to preserve its vibrancy and hallmark characteristics of freedom and openness. Recognizing that there is broad agreement on the need to protect these features, the NPRM explores the best policy framework for achieving this goal. Specifically, the NPRM examines whether to retain, modify or eliminate the three existing "bright line" Net Neutrality rules and the Transparency Rule, given the paucity of alleged or demonstrable neutrality violations, the lack of virtually any "quantifiable evidence of consumer harm" at the hands of broadband ISPs and the availability of Federal Trade Commission ("FTC") oversight and enforcement against Internet actors of antitrust and unfair and deceptive practices statutes.[210] The NPRM also explores whether there is or is likely to be any evidence of market failure sufficient to warrant pre-emptive, comprehensive regulation, whether any rules should be applied solely to providers that have market power and whether any approach adopted – *ex*

[209] *See* Sjoberg Declaration, ¶¶ 12-13 (Sjoberg's abandoned its use of data caps and overage charges due to the potential for FCC enforcement action despite the fact that doing so caused it to lose revenues necessary to support its bandwidth transport costs). *See also* Kyle Declaration, ¶ 15 (Shentel altered and deferred its planned use of data allowances and overage charges due to uncertainty whether its practices would pass muster under Title II and the Internet General Conduct standard, causing loss of revenues it could have invested back in the network to expand capacity); Hickle Declaration, ¶ 11 (Velocity altered its data cap, causing it to forgo overage revenues that could have been "plowed back into" the network due to enforcement concerns).

[210] NPRM, ¶¶ 76, 105-115 (identifying FTC jurisdiction over certain aspects of broadband Internet access service once the service is reclassified as an information service as the "baseline" scenario for performing a cost-benefit analysis of the need for *ex ante* FCC ISP regulation).

ante rules, expectations regarding industry self-governance, or *ex post* enforcement practices – should "vary based on the size, financial resources, customer base of the broadband Internet access service provider, and/or other factors, and whether the existence of antitrust regulations aimed at anticompetitive behavior would provide a sufficient backstop to render ex ante rules aimed at anticompetitive behavior unnecessary."[211]

The Internet and broadband deployment have flourished, as the NPRM observes, because information services were keep largely "unfettered" by federal and state regulation since the beginning.[212] Three years ago, ACA expressed skepticism that the record before the Commission would support the imposition of *ex ante* Net Neutrality rules on broadband ISPs, given the lack of widespread problems with ISP handling of traffic,[213] and remains skeptical that the record in this proceeding will either. That is, it is extremely doubtful the rules' costs will be outweighed by their benefits under a cost-benefit analysis conducted by the Commission, particularly for smaller ISPs for whom the rules provide no public benefit. There is no threat that these smaller ISPs would block, throttle or otherwise discriminate against Internet edge providers because doing so would not allow them to extract any consideration from the comparably larger actors who operate on the Internet's edge – any attempt would only result in these smaller ISPs losing subscribers to competitors due to their impairment of their customers' Internet experience.

It bears noting that the existing Net Neutrality rules were layered on top of the existing authority of other agencies over the Internet marketplace. Even absent FCC rules, federal and state antitrust authorities are well positioned to protect competition and consumers from

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[211] NPRM, ¶ 77.

[212] *Id*., ¶¶ 5, 6-10; *see* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive services, unfettered by Federal or State regulation").

[213] ACA 2014 Open Internet Comments at 4, 60-61.

anticompetitive, unfair or deceptive trade practices by any participant in the Internet ecosystem.[214] The U.S. Department of Justice and FTC are already well positioned to police and take action against anti-consumer and anticompetitive behavior by Internet actors as they are with respect to other sectors of our economy. An added benefit of such an approach is that it applies to all Internet actors equally, thus avoiding the principal failing of the Commission's approach in 2015 of imposing asymmetric behavioral regulations and transparency requirements on broadband ISPs under the banner of protecting Internet openness, but leaving Internet edge providers free to threaten or engage in the same types of behavior prohibited to ISPs free of any *ex ante* constraints.[215]

ACA members, along with other broadband ISPs, share the desire to preserve the open Internet and have committed to doing so, regardless of the outcome of this proceeding.[216] The

[214] It is also noteworthy that in the past, federal antitrust authorities have cautioned against such *ex ante* regulation. In 2007 the Federal Trade Commission not only concluded that the broadband market was competitive, but it also warned that regulators should be "wary" of network management rules because o of the unknown "net effects … on consumers." Federal Trade Commission, Internet Access Task Force, Broadband Connectivity Competition Policy FTC Staff Report, at 157 (rel. June 27, 2007). The Department of Justice's Antitrust Division reached a similar conclusion in 2010, filing comments that warned against the temptation to regulate "to avoid stifling the infrastructure investments needed to expand broadband access." *See Economic Issues in Broadband Competition, A National Broadband Plan for Our Future*, *Ex Parte* Submission of the U.S. Dept. of Justice, GN Docket No. 09-51, at 28 (filed Jan. 4, 2010).

[215] ACA 2014 Open Internet Comments at 6-26 (discussing the market-distorting effects of regulation that misidentifies the locus of a threat to Internet openness and mis-targets the agent responsible by failing to recognize that threats to Internet openness are constantly evolving).

[216] NCTA – The Internet & Television Association, *Reaffirming Our Commitment To An Open Internet* (May 17, 2017), *available at* https://www.ncta.com/platform/public-policy/reaffirming-our-commitment-to-an-open-internet/ ("May 17 Washington Post Ad") (featuring a May 17, 2017 advertisement in the Washington Post highlighting 21 large and small ISPs, including ACA members, and their commitment to an open Internet). *See* AT&T, *Open Internet*, http://about.att.com/sites/open_internet (last visited Jul. 16, 2017) (AT&T "support[s] an open internet."); Brian L. Roberts, *Comcast Statement Supporting a Free and Open Internet*, COMCAST (Apr. 26, 2017), http://corporate.comcast.com/comcast-voices/comcast-statement-supporting-a-free-and-open-internet (Comcast "continue[s] to strongly support a free and Open Internet."); NCTA – The Internet & Television Association, *Supporting an Open Internet*, https://www.ncta.com/positions/supporting-open-internet (last visited Jul. 16, 2017) (ISPs "have always been committed to and offered American consumers a powerful, open internet experience so they can enjoy the web content, services and applications of their choosing.").

statements of 21 ACA and NCTA member companies are indicative of the broad industry consensus on acceptable ISP behavior:

> As providers of broadband internet service in many communities across America, we've always been committed to an open internet that give you the freedom to be in charge of your online experience. And that will not change. An open internet means that we do not block, throttle or otherwise impair your online activity. We firmly stand by that commitment because it is good for our customers and good for our business.[217]

This commitment is fully consistent with the statement of Internet freedoms embodied in the Commission's 2005 Internet Policy Statement.[218] Given this, and the lack of complaints concerning the network management and commercial practices of smaller ISPs, ACA is again dubious that *ex ante* regulation in this area will be called for.

Nonetheless, ACA acknowledges that there is a great deal of public fear about what ISPs might do in the absence of open Internet rules.[219] Given the high level of public concern, ACA understands some policymakers' desire to ensure that appropriate protections are in place to prevent broadband ISPs from engaging in anticompetitive or anti-consumer practices with respect to their treatment of Internet traffic. These protections, as the NPRM notes, can take the form, for example, of rules, principles, industry self-regulation or *ex post* enforcement practices.[220] The Commission is right to explore all its options, including reversion to the pre-2010 status quo of guiding industry behavior through no more than the issuance of Internet policy principles and continued monitoring of industry trends and consumer complaints.

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[217] May 17 Washington Post Ad.

[218] Internet Policy Statement, ¶ 4 (adopting principles that entitle consumers to access lawful content, applications and services, connect to devices of their choosing, and maintain competition among network, application and service, and content providers).

[219] As Lincoln said, "In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed." Abraham Lincoln, First Debate with Steven Douglas, delivered at Ottawa, Illinois, Aug. 21, 1858, *available at* http://www.bartleby.com/268/9/23.html (during the campaign for the election of the Legislature of Illinois, which should choose a successor to Douglas in the United States Senate).

[220] NPRM, ¶ 77.

Transgressions against Internet openness are quickly revealed by the traditional and Internet social media, leaving little likelihood that harms would go unnoticed or un-remedied.

To the extent the Commission determines that the benefits of having enforceable Net Neutrality rules would outweigh their costs, including for smaller ISPs, there appears to be a good deal of consensus favoring the substance of the Commission's 2010 Open Internet rules prohibiting blocking and unreasonable discrimination, subject to reasonable network management.[221] There appears to be somewhat less consensus on how to approach paid prioritization, given the fact that priority delivery services are common in other industries and can have both pro- and anticompetitive effects, but there should be little doubt that anticompetitive paid prioritization should not be tolerated.

Nonetheless, should the Commission determine that the benefits of having enforceable Net Neutrality rules would outweigh their costs, it should fashion its rules so that they apply to ISPs and edge providers alike. Internet edge providers can engage in the same blocking, throttling and discriminatory behavior that impairs the end user experience that ISPs are alleged to have done, as ACA has previously demonstrated.[222] As has been apparent for some time, a handful of giant Internet edge providers – "Tech's 'Frightful 5'" – who wield enormous economic and market power, are now regarded as dominant players in the online world.[223] Anticompetitive and discriminatory blockages and degradations can occur at any point along the

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[221] 2010 Open Internet Order, ¶¶ 62-92. No throttling, added by the 2015 Open Internet Order, is closely related to the formulation of no blocking in the 2010 Open Internet Order and could easily be re-incorporated into the no blocking rule itself.

[222] ACA 2014 Open Internet Comments at 6-25; Lehr Paper.

[223] *See, e.g.*, Farhad Manjoo, *Tech's 'Frightful 5' Will Dominate Digital Life for Foreseeable Future*, NEW YORK TIMES (Jan. 20, 2016), https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html (Amazon, Apple, Facebook, Google and Microsoft are immune from competition because they "have each built several enormous technologies that are central to just about everything we do with computers. In tech jargon, they own many of the world's most valuable 'platforms' – the basic building blocks on which every other business, even would-be competitors, depend."); Om Malik, *In Silicon Valley Now, It's Almost Always Winner Takes All*, NEW YORKER (Dec. 30, 2015), http://www.newyorker.com/tech/elements/in-silicon-valley-now-its-almost-always-winner-takes-all (The "loop of algorithms, infrastructure, and data are potent. Add network effects to the mix, and you start to see virtual monopolies emerge almost overnight.").

pathways to and from Internet end users and edge providers. The instant rulemaking offers the Commission the opportunity to take a more comprehensive approach that includes Internet edge providers, some of whom have blocked or degraded consumer access to content, should it determine that enforceable rules are necessary.

It would be anomalous and harmful to place, as the Commission did in 2015, asymmetric economic regulation on just one sector of the Internet economy – Internet service providers – while leaving other actors in the Internet ecosystem equally if not better positioned to do harm, free of *ex ante* regulation. The Commission has recognized that consumers will be better off once it reclassifies broadband Internet access service as an information service, because that action will restore the FTC's authority to oversee the privacy practices of ISPs consistent with the treatment of "every online company's privacy practices."[224] The same principle, consistent treatment of all participants in the Internet marketplace applies with equal force to any *ex ante* Net Neutrality rules the Commission determines are required to protect the free and open Internet. By targeting all Internet actors capable of disrupting the "virtuous cycle" recognized by the *Verizon* court, thereby adversely impacting broadband deployment, the Commission can better ensure consumers the ability to freely obtain and use the content, applications, services, and devices they want on the Internet.

It bears mention that the policy principles contained in the Commission's 2005 Internet Policy Statement are reflective of this more comprehensive approach. The Policy Statement describes a set of four consumer entitlements focused on enabling end user choice of Internet content, applications, services and devices by ensuring "that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner."[225] These principles were based on four consumer "freedoms" first articulated in 2004

[224] NPRM, ¶ 66.

[225] Internet Policy Statement, ¶ 4. The principles provided that, subject to reasonable network management, consumers are entitled to: (i) access the lawful Internet content of their choice; (ii) run

by former FCC Chairman Michael Powell who, as the NPRM notes, stressed that "'ensuring that consumers can obtain and use the content, applications and devices they want . . . is critical to unlocking the vast potential of the broadband Internet.'"[226] At the time of their issuance, the Commission did not expect only broadband Internet access providers to follow this open Internet policy, but all Internet actors.

This broader concern with non-neutral behavior on the part of both broadband ISPs and Internet edge providers interrupting the "virtuous circle" driving broadband deployment and adoption has been lost in the shuffle of the Commission's serial attempts to codify the principles into rules applied only to broadband Internet ISPs, to the detriment of consumers and the marketplace. The instant rulemaking presents the Commission with an opportunity to restore it, should the Commission determine enforceable rules are necessary. Doing so will better ensure free and open consumer access to all the lawful content without interference by parties stationed at either the on-ramps or the off-ramps. It will also avoid the unintended consequences of asymmetrical rules that only apply to certain parties engaged in complex relationships.

The NPRM questions what legal authority the Commission would have in this area should it reclassify broadband Internet access service as an information service,[227] and seeks

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applications and use services of their choice, subject to the needs of law enforcement; (iii) connect their choice of legal devices that do not harm the network; and (iv) competition among network providers, application and service providers, and content providers.

[226] NPRM, ¶ 12; Remarks of Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for Industry*, prepared for Silicon Flatirons Symposium, Boulder, CO (Feb. 8, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf. Former Chairman Powell's first "Internet Freedom," the "Freedom to Access Content," is instructive, as Powell challenged "all facets of the industry to commit to allowing consumers to reach the content of their choice." The former Chairman understood that the "Freedom to Access Content" would protect consumer expectations that they would "be able to go where they want on high-speed connections, and those who have migrated from dial-up would presumably object to paying a premium for broadband if certain content were blocked." He also advocated that any restraints should be "clearly spelled out" and as minimal as possible. *Id*. at 5.

[227] NPRM, ¶ 100.

comment on two principal sources of potential regulatory authority, Sections 706 and 230, as well as any other sources of authority.[228] ACA has previously taken the position that the Commission had no need to reclassify broadband Internet access as a Title II telecommunications service because it had adequate legal authority to regulate broadband Internet access service providers (as well as Internet edge providers) under Section 706 of the Act, should it determine that open Internet rules were necessary,[229] and continues to maintain that to be the case.[230] ACA continues to believe that, should the Commission determine *ex ante* rules are necessary, it may rest open Internet rules once again solely on Section 706 by following the *Verizon* court's suggestions for avoidance of the imposition of "*per se* common carrier" obligations upon broadband Internet access service providers.[231]

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[228] *Id*., ¶¶ 101-103.

[229] ACA 2014 Open Internet Comments at 41-52; ACA 2014 Open Internet Reply Comments at 2-23. Specifically, ACA agreed with the 2014 Open Internet NPRM's interpretation of "sections 706(a) and (b) as independent and overlapping grants of authority that give the Commission the flexibility to encourage deployment of broadband Internet access service through a variety of regulatory methods, including removal of barriers to infrastructure investment and promoting competition in the telecommunications market, and, in the case of section 706(b), giving the Commission authority to act swiftly when it makes a negative finding of adequate deployment," and seeks comment on the Commission's authority under Section 706. ACA 2014 Open Internet Comments at 45; *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 95 (2014) ("2014 Open Internet NPRM").

[230] Sections 706 (a) and (b) have been interpreted by both the Commission and the *Verizon* court as granting the Commission authority to adopt rules that would "'encourage the deployment' of advanced telecommunications capability by promoting competition in the telecommunications market and removing barriers to infrastructure investment. 2014 Open Internet NPRM, ¶ 143; *Verizon*, 740 F.3d at 635-643. In its *Verizon* decision, the D.C. Circuit Court of Appeals accepted the Commission's premise that an open Internet enables a "virtuous circle" or cycle of innovation at the edge of the Internet, leading to consumer demand for broadband services, investment and deployment of broadband infrastructure, and the Commission's justification that it may regulate the economic relationship between broadband ISPs and Internet edge providers pursuant to Section 706 to ensure that broadband ISPs do not themselves constitute "barriers" to broadband infrastructure deployment by inhibiting that openness. More specifically, the *Verizon* court upheld the Commission's authority under Section 706 to regulate "broadband providers' economic relationships with edge providers if, in fact, the nature of those relationships influences the rate and extent to which broadband providers develop and expand their services for end users." *Verizon*, 740 F.3d at 643.

[231] ACA also continues to believe that Section 706 affords the Commission the authority to regulate the practices of Internet edge providers that threaten the free and open Internet by interfering with the virtuous cycle of innovation, consumer demand and broadband deployment and that it would be inequitable to continue to regulate broadband ISPs but leave Internet edge providers free to engage in harmful conduct. *See* ACA 2014 Comments at 6-25, 41-52 ("The Commission's broad authority to protect Internet openness under Section 706 permits, if not compels, the Commission to reach the behavior of

C. The Commission Should Examine Ways to Reduce the Complexity of Compliance with its Transparency Rule Should It Retain the Rule in its Current Form.

ACA agrees with the NPRM's observation that disclosure requirements can be among the least intrusive of regulatory measures at the Commission's disposal,[232] and appreciates the Commission's examination of "whether the existing transparency rule is the best way to accomplish" the Commission's objectives in promoting "'competition, innovation, investment, end-user choice, and broadband adoption.'"[233] ACA welcomes the Commission's examination of whether the Transparency Rule as promulgated in 2010 is necessary and adequate to protect consumers,[234] and its further inquiry concerning whether, if the rule is retained either in its original contours or as augmented by the 2015 enhancements, the Commission should continue to enforce the 2016 advisory guidance issued by the Commission's Chief Technology Officer regarding acceptable methodologies for disclosure of network performance to satisfy the enhanced transparency rule.[235]

There is no dispute that consumers expect and deserve to receive accurate information about broadband Internet access service at the point of sale and on an on-going basis as subscribers to the service. So too, Internet edge providers benefit from understanding how broadband ISPs are managing their networks so that they can take network management practices into account when developing their content, applications, services, and devices. Moreover, there's no argument that ISPs benefit when their customers receive service that meets or exceeds their expectations, and can access services from edge providers that are

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Internet edge providers for precisely the same purpose of ensuring that the virtuous 'circle' of innovation on the Internet is not broken by the anticompetitive or discriminatory actions of 'must have' Internet edge providers.").

[232] NPRM, ¶ 90.

[233] *Id*., ¶ 89; 2015 Open Internet Order, ¶ 157; 2010 Open Internet Order, ¶ 56.

[234] NPRM, ¶ 90.

[235] *Id*., ¶ 91. The NPRM also asks whether the repeated need for advisory guidance following adoption of the original Transparency Rule indicates that the rule itself is too open-ended. *Id*.

optimized for their ISP's network. The only question is whether there is a need for the Commission to prescribe the contents and delivery of this information by broadband ISPs, and whether the costs of imposing the Transparency Rule are outweighed by its benefits. Again, while ACA remains skeptical the record will inarguably support *ex ante* rules in this area, should the Commission decide to retain the existing Transparency Rule as is, it may wish to explore ways to reduce the complexity of compliance with its mandate. The existing Transparency Rule itself, as adopted in 2010 and continuously in effect since 2011, consists of a single sentence.[236] At the time of its adoption, the Commission, in responding to concerns about burdens that derive from prescriptive transparency obligations that were raised by ACA and others, rightly concluded that, "the best approach is to allow flexibility in implementation of the Transparency Rule, while providing guidance regarding effective disclosure models."[237] While ACA appreciates the rule's flexibility, it notes that the brief rule itself was accompanied by five pages of explanatory text in the 2010 Open Internet Order and, as enhanced, an additional 13 pages of explanatory text in the 2015 Open Internet Order, all of which has been augmented by approximately twenty additional pages of advisory guidance from the Commission's Enforcement Bureau, Office of General Counsel, and Chief Technologist.[238] For a smaller ISP, sorting through nearly forty pages of explanatory text concerning the meaning of a one sentence

[236] *See* 47 C.F.R. § 8.3 ("A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding the use of such services and for content, applications, service and device providers to develop, market, and maintain Internet offerings.").

[237] 2010 Open Internet Order, ¶ 56.

[238] *Id*., ¶¶ 53-60; 2015 Open Internet Order, ¶¶ 154-185; *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, 26 FCC Rcd 9411 (2011) ("2011 Advisory Guidance"); *FCC Enforcement Advisory*, *Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606, 8607 (2014) ("2014 Advisory Guidance"); *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, 31 FCC Rcd 5330 (2016) ("2016 Advisory Guidance").

rule and acceptable means of compliance with the disclosure requirements can be a daunting task, requiring many staff hours and consultation with outside legal counsel.

From the start of the Open Internet proceedings in 2009, ACA has argued that transparency obligations impose substantial burdens on ISPs and these burdens must be balanced against the potential benefits for their users.[239] Virtually none of ACA's 680 members serving fewer than 20,000 subscribers – that is, the vast majority of ACA members – has in-house counsel or other personnel dedicated to addressing regulatory compliance matters and for them, the burdens associated with complex transparency requirements can be particularly burdensome. In addition, the benefits achieved from imposing the panoply of disclosure requirements on smaller ISPs are less because these providers tend to have closer relationships with, and thus are already more responsive to, their users. Further, with specific respect to the enhanced transparency rules, smaller ISPs cannot leverage upstream edge providers and the nature of their network management practices or network performance is of little or no interest to Internet edge giants like Amazon, Netflix or Google.

[239] *Preserving the Open Internet*, GN Docket No. 09-191 and WC Docket No. 07-52, Comments of the American Cable Association at 16-17 (filed Jan. 14, 2010) (supporting transparency regulations limited to posting network management practices on a company's website); ACA 2014 Open Internet Comments at 26-40 (opposing adoption of proposed transparency enhancements as unduly burdensome relative to dubious need for the additional information); ACA 2014 Open Internet Reply Comments at 52-66 (discussing lack of record support for adoption of enhancements and requesting an exemption for smaller ISPs). ACA also filed comments in the Commission's Paperwork Reduction Act (PRA) proceeding reviewing the enhanced transparency requirements and in the Commisison's proceeding considering the temporary small business exemption from these requirementssee. *Notice of Information Collection Being Reviewed by the Federal Communications Commission*, 80 Fed. Reg. 29000 (rel. May 20, 2015) ("PRA Notice"). *See* Comments of the American Cable Association, *Protecting and Promoting the Open Internet and Notice of Information Collection*, GN Docket No. 14-28 and OMB Control No. 306-1158 (filed July 20, 2015) ("ACA PRA Comments"); *Consumer and Government Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, Public Notice, DA 15-731, GN Docket No. 14-28 (rel. June 22, 2015). *See* Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements, GN Docket No. 14-28 (filed Aug. 5, 2015); Reply Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements, GN Docket No. 14-28 (filed Sept. 9, 2015) ("ACA Small Business Exemption Reply Comments").

ACA raised its concerns that the transparency requirements would impose undue burdens on smaller ISPs when the Transparency Rule was adopted in 2010 and then in 2011 during the Paperwork Reduction Act review process.[240] ACA believes the Commission provided a reasonable response when it issued the 2011 Guidance covering, among other things, alternative means of compliance to measure and disclose performance characteristics.[241] ACA was especially pleased with the way that the Commission handled the reporting of performance characteristics for smaller ISPs that did not participate in the Measuring Broadband America testing program. ACA was also pleased with how the Commission handled this reporting obligation in the 2016 Guidance on Open Internet Transparency Rule Requirements by the Chief Technologies, Office of General Counsel, and Enforcement Bureau. For this reason, so long as small ISPs are required to report performance characteristics, the Commission should not disturb the guidance that has been provided to smaller ISPs. Nonetheless, all other aspects of compliance with the Transparency Rule are complicated, particularly for companies lacking in-house legal counsel.

Although ACA appreciates the flexibility built into the Transparency Rule, as it evaluates the relative costs and benefits of retaining or modifying the rule, the Commission may wish to seek a better balance between flexibility and the complexity smaller ISPs face in navigating

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[240] *See* Letter from Ross Lieberman, Vice President of Government Affairs, American Cable Association, et al. to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed June 8, 2011).

[241] 2011 Advisory Guidance (encouraging broadband Internet access service providers to describe actual network performance by "disclos[ing] data from the [Measuring Broadband America or "MBA"] project showing the mean upload and download speeds in megabits per second during the 'busy hour' between 7:00 p.m. and 11:00 p.m. on weeknights" while providing non-MBA participants the flexibility to "disclose actual performance based on internal testing; consumer speed data; or other data regarding network performance, including reliable, relevant data from third-party sources such as the broadband performance measurement project"). ACA again raised its concerns about the burdens on smaller ISPs as the Commission considered enhancements to the Transparency Rule. ACA 2014 Open Internet Comments at 26-40; ACA 2014 Open Internet Reply Comments at 52-66. The Commission sought to address these concerns in the *2015 Open Internet Order* by providing a temporary exemption from the enhancements and ultimately granted broader relief from the enhancements in the form of a five-year waiver earlier this year. *Small Business Exemption From Open Internet Enhanced Transparency Requirements*, Order, 32 FCC Rcd 1772 (2017).

through the rule, the orders and the advisory guidance in their efforts to comply with the required disclosures.

V. CONCLUSION

For the foregoing reasons, ACA submits that the Commission should proceed with its proposals to end the unnecessary and burdensome utility-style Title II regulation of the Internet imposed by the 2015 Open Internet Order and reinstate a light-touch regulatory approach that will reverse the decline in broadband infrastructure investment, innovation and options for consumers the Commission's misguided 2015 set in motion.

Respectfully submitted,

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July 17, 2017

EXHIBIT A

Declaration of Jim Hickle

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

DECLARATION OF JIM HICKLE

DECLARATION OF JIM HICKLE
VELOCITY TELEPHONE, INC./GIGABIT MINNESOTA

1. My name is Jim Hickle. I am the President of Velocity Telephone, Inc./Gigabit Minnesota. My business address is 4050 Olson Memorial Hwy, Suite 100, Golden Valley, Minnesota 55422.

2. I have been with Velocity since 2004. In my role, I oversee services for business and residential customers. I have been working in the cable/telecommunications industry for over 22 years. Prior to my role at Velocity, I worked as a sales representative for US West and Qwest Communications.

3. Velocity Telephone is a competitive local exchange carrier (CLEC) offering voice, video, data and Internet to residential and business customers. Gigabit Minnesota is a fiber-based provider of voice, video, data and Internet, serving the Rosemount, Minnesota community. Collectively, we serve approximately 2,500 residential broadband customers in the Minneapolis-St. Paul metropolitan area. Our CLEC operation offers both circuit-switched telephony and VoIP. We have 4,489 circuit-switched voice subscribers and 1,045 VoIP subscribers. We also serve dial-up Internet access to approximately 2,000 customers.

4. Velocity is a unique and innovative company, known for reinventing itself. We began in 1997, as a dial-up Internet access company named USFamily.net, serving the Twin Cities area. In 2000, we incorporated Velocity Telephone as a circuit-switched CLEC and developed our own VoIP service in 2010. In 2010, we also began developing fiber connections into business parks. Three years ago, we purchased a fiber network in a development located in Rosemount, a mid-size suburb of Minneapolis, and began marketing fiber-to-the-home services under the Gigabit Minnesota d/b/a. We want to build fiber throughout Dakota County in Minnesota and serve both business and residential customers. Fiber assets allow us to bring Gigabit services to the home. We have a strong relationship with our community. We don't offer special deals or promotions, but our customers keep coming back.

5. We currently have just 35 employees. Customer service is an important part of our company's ethos, and I will personally take customer service calls from time to time. None of Velocity's employees works solely on regulatory compliance. In addition to my duties as president, I am also responsible for regulatory compliance and often fill my days working on FCC-related matters. We often need to hire outside attorneys and consultants for compliance work.

6. Our broadband Internet access service, supported by our high-performance fiber network, offers our customers the capability to freely access all lawful content, applications and services on the Internet, generate and transform content of the end user's choosing, exchange packets with other Internet users and service providers, and run a variety of applications including but not limited to e-mail, web browsing, audio streaming, video streaming, and file sharing. We have not made any fundamental changes in the functionalities offered or the nature of the service we make available to subscribers and potential subscribers since we started offering the service – it has always been a functionally integrated offering. Our investments are aimed at improving our customers' Internet experience in terms of increasing available bandwidth and upload and download speeds rather than changing the nature of what we offer, which is Internet access. We have not made any substantial changes to the way that we market our broadband Internet access service either. We have always emphasized both the always-on capabilities that fiber-based broadband Internet access would afford subscribers, including the ability to retrieve and utilize the panoply of available Internet content and applications, and the fast speeds at which they would be able to stream, download and upload Internet content. We may have placed more emphasis in our advertising on speed and service quality as our network has improved. We do that because customers are more familiar now with the enhanced capabilities offered by broadband Internet access service than they were in the early years, leaving us free to focus our advertising on service quality and network

performance to differentiate ourselves from other providers of Internet access that we compete with.

Increased Uncertainty and Compliance Costs

7. The economics of our business were harmed by the FCC's Title II decision. Velocity competes with incumbent local exchange carriers (ILECs) CenturyLink and Frontier, as well as cable companies Comcast and Charter. As a company, we work to expand broadband to unserved communities. We see our role as a disruptive factor to ILECs and Cablecos in the market and believe that building fiber to provide high speed Internet access service builds a market, attracting a competitive response. Although we would like to continue to expand our fiber service, the costs and burdens of compliance following the FCC's decision in its 2015 Open Internet Order to reclassify broadband Internet access as a Title II telecommunications service have negatively affected our fiber plans. Title II reclassification has increased our regulatory compliance expenditures, had a direct and adverse impact on our ability to finance improvements and invest in our plant, and has decreased our incentive and ability to innovate and offer our customers new features and services.

8. The major impact of the Title II reclassification and the uncertainty regarding what it would mean for us has been increased costs, as we have spent additional time and money to understand the new regulatory obligations. Broadband Internet access was an extremely attractive line of business for us because it was not heavily regulated. We do a lot of regulatory compliance work as a telephone company, but our broadband service had not been treated as a Title II common carrier service by either the FCC or our state public utility commission prior to 2015. Telecom regulatory compliance is a huge burden on our company and me personally. The FCC's Title II decision and the Internet General Conduct standard opened the door to an abundance of burdensome new requirements at both the federal and state levels, including the potential for rate regulation, dramatically raising the level of regulatory

uncertainty facing our company. For a company of our size and the customers we serve, Title II reclassification is all burden and no benefit.

9. Following Title II reclassification, we spent significant resources attempting to identify exactly what our new broadband obligations are. While we are familiar with Title II standards for voice telephony – that is, to be deemed lawful under Title II, the rates, terms, conditions, and practices associated with our broadband service must be "just and reasonable" and not unjustly or unreasonably discriminatory – we also know these terms are vague and open to a variety of interpretations, and how they would apply to the way we provide broadband Internet access service is anyone's guess. The FCC's vague and open-ended Internet General Conduct standard, imposed pursuant to its Title II authority, likewise prohibits "unreasonable" interference or "unreasonable" disadvantage to consumers or Internet edge providers like Google or Netflix. Again, what is "reasonable" in this context can be interpreted in numerous different ways, as can what constitutes "interference" or "disadvantage." We know that anyone can file a complaint against us with the FCC alleging a violation of Title II requirements, or file a complaint in federal court to recover for damages caused by violations of the statute. Being subject to these requirements left us very concerned that our broadband rates and practices would be deemed unlawful after-the-fact by the FCC or the courts.

10. Velocity had to pay outside counsel to help me and our staff understand our new Title II obligations and the new Internet General Conduct standard and ensure that our existing service and consumer facing disclosures and notices comply with these requirements following the Title II decision. Specifically, we spent time and hired outside counsel to review and revise our Acceptable Use Policy ("AUP"), which also contains the terms and conditions governing our broadband service, to ensure compliance with the new obligations under Title II. We will have to conduct similar reviews on any new features and services we are considering rolling-out, thus increasing the costs of those services as well. We are a cash-flow business; these reviews

imposed costs, and money spent on regulatory compliance is money taken away from putting fiber in the ground.

11. Title II reclassification also caused us to incur costs to review and revise our current services to ensure compliance with the new standards. We had to review and alter our data cap practices out of fear that our prior practices might run afoul with the vague Title II and Internet General Conduct standards. For example, to provide better service for all our customers by preventing a small number of customers from utilizing a disproportionate amount of shared bandwidth, we had been imposing a residential maximum data usage cap of 300 GB/month. If the cap is exceeded, the customer may incur an overage charge or be bumped to a higher tier. Following the Title II decision, we raised the cap to 1,000 GB/month, even though we know our largest users were using only about 300 GB/month. By setting the cap so high, we had to forgo overage revenues that we could have plowed back into our network. Nonetheless, we set the cap that high to eliminate the potential of having a complaint filed against us based on allegations that "we aren't being reasonable based on Title II requirements."

12. The Title II decision also harmed our ability to finance our business by increasing our cost of capital. We noticed an increase in our cost of borrowing due to just the risk of Title II rate regulation, even before the 2015 Open Internet Order was adopted. We found banks apprehensive about lending given the intense speculation that the FCC would move forward with its reclassification proposal. A national bank with which we had previously done business had initially approved a loan for a fiber network acquisition we wanted to make, and then suddenly backed off. The timing of their decision coincided with the consideration of the Title II decision. We received an indication from the bank that it would not approve the loan just after the Open Internet Order was released in February 2015. We had to find a new bank that would approve a loan, increasing the amount of work required to obtain financing and delaying our receipt of needed funding.

Decreased Innovation

13. In addition to increasing our costs, the biggest effect of the Title II decision has been a decrease in our ability to innovate in terms of features and services. The prospect of broadband rate regulation hangs heavily over us and has depressed our incentive to invest and roll out new features and services to consumers. We constantly must ask ourselves whether new features and services we are considering could run afoul of the FCC's rules and lead to an investigation and enforcement action. We are absolutely committed to complying with all federal, state, and local requirements, but the vagueness of our obligations under Title II and the Internet General Conduct standard makes that calculus extremely difficult, and has thus impaired the way we had been doing business.

14. We had recently been considering whether to roll out some new services but have decided not to deploy them because of the high degree of regulatory uncertainty under Title II. For example, we have considered employing better network management tools and rolling out an over-the-top video product and a service that would allow customers to pay for dedicated access to a certain channel over fiber to improve voice service, but pushed off any deployment of these services following Title II. All of these practices would enhance and improve our customer's service, but we are not sure if they would be considered a violation under Title II or the Internet General Conduct standard. There is no certainty that these practices would be found to pass muster under the law if we had to justify them after-the-fact in an enforcement action.

Decreased Investment

15. The decision to reclassify broadband Internet access as a Title II telecommunications service has dramatically slowed our decisions to invest in our broadband Internet service through upgrades and expansion. Specifically, the threat of FCC Title II rate regulation has had a detrimental effect on our investment decisions and expansion plans. Although we had originally intended to improve portions of our fiber system in the Rosemount

area during the summer of 2015, we delayed upgrades of our network and expansions of our service until after we assessed the impact of the Title II decision. But for the Title II decision, we would have upgraded and expanded the service earlier and reaped the competitive benefits sooner.

16. Title II reclassification also caused us to refrain from hiring new staff. For example, our general manager left the company over a year ago, and instead of replacing him with a new hire, we split that position's duties up among our other current employees. Although collectively we could not match the general manager's skill set this way, we assessed the regulatory costs of Title II and made the choice not to hire a more expensive employee. We struggled for eight months without this role filled and, in my view, this had a detrimental impact on our operations, slowing our progress in improving our service.

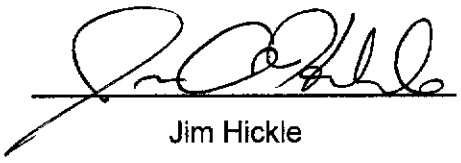
17. The uncertainty created by Title II reclassification and the Internet General Conduct standard negatively affected our plans to invest by buying other properties. As a broadband company, we are always looking for opportunities to acquire new systems. Currently, because of the regulatory overhang of Title II, we have no appetite to buy more systems because Title II regulation – particularly the potential for rate regulation – depresses the level of our potential return on these investments. Without a doubt, Title II factors into the investment climate and our decision-making. We run every potential deal through that filter. Our most recent acquisitions were prior to the FCC's Title II decision, including the fiber acquisition in Rosemount that was completed in 2014. We have not made an investment of a similar magnitude since reclassification even though there were opportunities for acquisitions.

18. An FCC decision to revoke the Title II classification will relieve of us of the fear of moving forward with plans for a major system rebuild and new services by taking rate regulation off the table. Removing the overhang of Title II regulatory uncertainty will remove the hesitation we have felt in moving ahead with offering consumers innovative new services and upgrading

and expanding our broadband network and Internet services. It will allow us to focus on forward-looking innovations and investments rather than backward-looking compliance efforts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on July 17, 2017.



Jim Hickle

EXHIBIT B

Declaration of Chris Kyle

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

DECLARATION OF CHRIS KYLE

DECLARATION OF CHRIS KYLE
SHENTEL

1. My name is Chris Kyle. I am Vice President of Industry Relations & Regulatory, Shenandoah Telephone Company ("Shentel").

2. I have been with Shentel since 2003. In my current role, I am responsible for negotiating programming agreements and I am the primary contact with local, state and Federal legislators and regulators. I have been working in the cable/telecommunications industry for over 20 years. Prior to my role at Shentel, I worked for an investment bank and several other telecommunication companies.

3. Shentel is a 115 year-old publicly-traded rural provider focusing today on delivering voice, video and broadband Internet over both cable and telephone plant in portions of Virginia, West Virginia, and western Maryland. Shentel's cable broadband network passes 170,000 households and its DSL networks pass about 22,000 households. Shentel has 51,000 cable broadband Internet subscribers, about 11,500 DSL Internet subscribers and 54,000 video subscribers. Shentel has 18,000 circuit-switched voice subscribers and 21,000 VoIP subscribers. Shentel serves a lot of very small and remote communities such as Rural Retreat and Farmville, Virginia, with at most only a few thousand households, and also serves economically depressed areas such as McDowell County, West Virginia, the second poorest county in the nation. Despite these challenges, the company has made broadband deployment a priority and was recognized as being the first 100 GB network to be built in Virginia. To finance its network, Shentel relies on subscriber revenues and risk capital from the financial markets. Although Shentel faces little competition in these areas, it must offer good quality service at a reasonable price to attract customers who have never before subscribed to Internet access service.

4. Shentel has 1,200 employees. Although we have a small number of in-house legal counsel, we often need to hire outside attorneys and consultants to advise on regulatory compliance work.

5. Shentel has been offering broadband Internet access service since 2008 over our cable properties and since 2000 over our telephone properties. Nothing fundamental has changed in the nature of the broadband Internet access service we offer our subscribers since we first rolled the service out in Shenandoah County, Virginia. Unlike our voice telephony service, our broadband Internet access service, supported by our high-performance network, consists of a functionally integrated service. We don't block, throttle or discriminate in our handing of Internet traffic. Our broadband Internet access service grants our customers the capability to freely access all lawful content, applications and services on the Internet, generate and transform content at their request, exchange packets with other Internet users and service providers, and run a variety of applications including but not limited to e-mail, web browsing, audio streaming, video streaming, and file sharing. Our investments have been aimed at improving our customers' Internet experience in terms of increasing available bandwidth and upload and download speeds rather than changing the nature of what we offer, which is Internet access. We spend considerable resources trying to drive broadband adoption in extremely rural and economically disadvantaged areas and are therefore motivated to provide the best Internet experience possible.

6. Our marketing of the service has not changed substantially over time either. To drive adoption, we have always emphasized both the always-on capabilities that broadband Internet access would afford subscribers, including the vast array of Internet content and applications with which subscribers can interact and the fast speeds at which they would be able to stream, download and upload Internet content. Our investments in increased network speed and reliability have paid off. As many of our customers now have become familiar with the enhanced capabilities offered by broadband Internet access service than they were in the

early years, we may have shifted some emphasis in our advertising to service quality and network performance, but that would have been a difference in emphasis rather than kind.

Increased Uncertainty and Compliance Costs

7. Title II reclassification has increased our regulatory compliance expenditures, harming the economics of our business. The major impact of the Title II reclassification and the uncertainty regarding what it would mean for us has been to increase our costs, as we have spent additional time and money to understand the new regulatory obligations. The FCC's decision to reclassify our broadband Internet access service and the Internet General Conduct standard opened the door to an abundance of burdensome new requirements at both the federal and state levels, including the potential for rate regulation, dramatically raising the level of regulatory uncertainty facing our company. Neither the FCC nor our state public utility commissions had treated our functionally integrated residential broadband Internet access service as a Title II common carrier service prior to the FCC's 2015 Open Internet Order. This left us uncertain how common carrier obligations would be applied to our broadband Internet access service, and the FCC's Order offered us little concrete guidance in that regard.

8. Following the FCC's Title II reclassification, we spent significant resources attempting to identify exactly what our new broadband Internet obligations are. While we are familiar with Title II standards for voice telephony – that is, to be deemed lawful under Title II, the rates, terms, conditions, and practices associated with our broadband service must be "just and reasonable" and not unjustly or unreasonably discriminatory – we also know these terms are vague and open to a variety of interpretations. Additionally, under Section 201(a), a common carrier must provide service upon "reasonable request." We could not determine how these requirements would apply to the way we provide broadband Internet access service, a vastly different type of service from circuit-switched telephony, with any amount of assurance. This exponentially increased the amount of regulatory uncertainty facing Shentel. And the risks for us in guessing wrong are not insignificant. Anyone can file a complaint against us with the

FCC alleging a violation of Title II requirements, or file a complaint in federal court to recover for damages caused by violations of the statute. The FCC's vague and open-ended Internet General Conduct standard, imposed pursuant to its Title II authority, likewise prohibits "unreasonable" interference or "unreasonable" disadvantage to consumers or Internet edge providers like Google or Netflix. Again, what is "reasonable" in this context can be interpreted in numerous different ways, as can what constitutes "interference" or "disadvantage." Being subject to these requirements left us very concerned that the FCC or the courts would deem our broadband Internet rates, terms, conditions and practices unlawful after-the-fact.

9. Title II reclassification also caused us to incur costs to review and revise our current services to ensure compliance with the new standards. As an incumbent rural phone carrier, we are well aware of the extent of common carrier regulatory burdens and the heightened standards applied to every action a common carrier takes under the statute. We spent considerable additional funds to ensure that we can justify our broadband Internet rates, terms, conditions and practices as "reasonable" and not "unreasonably" discriminatory. After the order came out, we had to have our staff and outside counsel/consultants run our planning through the Title II "just and reasonable" and the Internet General Conduct "no unreasonable interference/disadvantage" standards, increasing our costs of service. For example, we analyze peak node usage to determine when we need to add capacity and usually add capacity if a neighborhood node is at about 80% utilization. Because adding capacity takes time, in the interim we utilize network management tools at the node level to maintain a quality Internet experience for all users. We feared that if we employed those tools, our customers would think we were discriminating and we were concerned it would give Internet edge providers leverage to bring complaints. Although we had done this type of system utilization analysis before, we had to add a new layer of review by our staff and outside counsel for consistency with Title II obligations and the Internet General Conduct standard. This extra layer of review adds to our

cost of service and detracts from the resources we have available for service improvements and network expansion.

10. As a result of Title II reclassification, we also hired outside counsel to review all of our consumer-facing broadband Internet access notices and policies to ensure compliance with our new common carrier obligations and the Internet General Conduct standard. In addition to hiring outside counsel, we worked with an outside telecom consultant and hired additional in-house legal counsel as a result of the increased regulatory burdens we were facing as a result of the Title II decision. Needless to say, all of this extra legal review added to our costs.

11. In just one example, although we are familiar with the requirements for carrier use of customer proprietary network information ("CPNI") under Section 222 of the Act, and already have to comply with those for our voice services, we had to determine anew how to comply with the statute with regard to CPNI for our broadband Internet access customers. Being subject to Section 222 for our broadband Internet service required us to go back across our entire broadband Internet subscriber base to ensure that we are providing an opt-in function required. Just the review alone was a very complicated undertaking, involving a great deal of staff time and imposing additional costs. Regardless of what happened with the FCC's Broadband Privacy Order, the statutory commands of Section 222 have been applicable to our service since the 2015 Open Internet Order went into effect and continue to apply today. We had to use outside counsel to review our broadband Internet access data collection, use and sharing practices to ensure their compliance with the CPNI provisions of the Act.

12. We also bore the additional burdens associated with being considered like the broadband "carrier of last resort" in terms of our flexibility to respond to requests for service and line extensions as a common carrier. Under the Act, we must provide service upon "reasonable request." We feared we would be dragged into confrontations with customers for not building out under the "reasonableness" standard. Shentel has a method for making determinations

whether it is economical to extend broadband lines and how much of that burden the company should take on and how much the customer should be asked to shoulder. Because of reclassification, we had the added burden of being subject to a Section 208 complaint at the FCC if we determined we couldn't fill a request under our normal parameters and the customer felt aggrieved. This makes a difference in rural America. We build anywhere, and a lot of people will pay their reasonable share of the build out expenses, but some are not happy with that. If a customer does not want to pay for some of the build out, it could claim that we are being unreasonable in asking for a customer contribution to defray the costs and file a complaint with the FCC. Defending against such a complaint is a costly proposition. We had to set aside additional reserves to take account of the added risks resulting from the change in our regulatory status.

13. We also incurred additional direct costs associated with the change in our status when one of the utilities whose poles we use insisted that we pay the telecom rate, rather than the cable rate, for pole attachments after the 2015 Open Internet Order took effect. About a week later, we received a pole attachment rate increase to the telecom rate level from Appalachian Electric Power ("AEP"), despite the FCC saying in the Order that it did not intend to cause pole attachment rates to increase as result of the reclassification decision. Relying on this assurance, Shentel refused to pay the higher rate and AEP sued for $200,000. We eventually settled, but ended up paying a substantial increase in our pole attachment rates during the roughly 9 to 12-month period of time from the effective date of the 2015 Open Internet Order until the FCC released its decision reforming the telecom rate to be closer to the cable rate. To put it plainly, the power company took advantage of the reclassification and subsequent confusion about the appropriate pole attachment rate levels to jack up its rate and there was little we could do about it. This increased our costs needlessly and it was a direct result of the Title II decision.

Decreased Innovation

14. In addition to increasing our costs, the Title II decision decreased our incentive and ability to innovate in terms of features and services. We had to run our plans for new services and features through an analysis under Sections 201 and 202 as well as the Internet General Conduct Standard to see if they could run afoul of the FCC's rules and lead to an investigation and enforcement action. Shentel is committed to complying with all federal, state, and local requirements, but the vagueness of our broadband Internet obligations under Title II and the Internet General Conduct standard makes those determinations extremely difficult, and has impaired the way we had been doing business.

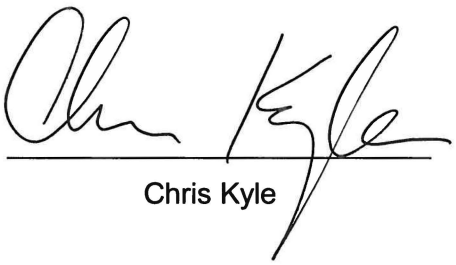
15. For example, we had intended to use data allowances and overage charges for network management purposes, to protect user experience from degradation and improve the performance of our network for all of our customers. Prior to September 2014, we started tracking customer data usage with the aim of fully rolling out data allowances and charges for overages later that year. Using network diagnostic software, we had found that 5 to 10% of our broadband Internet end users greatly exceed reasonable bandwidth usage per month, and this causes capacity issues for other users; 5% of users will max-out capacity in parts of the network each month. We felt that assessing overage fees for exceeding data allowances would create an economic incentive to deter that kind of practice. By sending those users accurate pricing signals about their bandwidth usage, we thought we could educate those who were unaware of the extent of their usage, and move some users to a higher tier of service that is more consistent with their usage patterns and needs. Importantly, the overage charges would generate revenues that we could invest back in the network to expand capacity. However, we could not be assured that the FCC would agree that our data allowances are a "just and reasonable" network management and pricing practice. Despite the fact that this would enhance and improve service for all our customers, we could not be sure if it would be considered a violation under Title II or the Internet General Conduct standard. There was just

no certainty that these practices would be found to pass muster under the law if we had to justify them after-the-fact in an enforcement action. Accordingly, we altered and delayed our data allowance plans and did not even begin our customer education program of putting usage data on customer bills (but not assessing overage charges) until July or August of 2015, delaying the benefits that full roll out of our data allowance plan would bring.

16. An FCC decision to revoke the Title II classification will relieve of us of the added costs of regulatory compliance. Removing the overhang of Title II regulatory uncertainty will remove the hesitation we have felt in moving ahead with offering consumers innovative new features and services and improving our existing service offerings. It will allow Shentel to focus more fully on increasing broadband deployment in hard-to-serve rural areas and devote its scarce resources on finding ways to incent broadband adoption by households lacking Internet access today, rather spending our limited time and financial resources on backward-looking Title II compliance efforts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on July 14, 2017.



Chris Kyle

EXHIBIT C

Declaration of Brian Lynch

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

DECLARATION OF BRIAN LYNCH

DECLARATION OF BRIAN LYNCH
ANTIETAM CABLE TELEVISION, INC.

1. My name is Brian Lynch. I am Senior Vice President of Cable Operations for Schurz Communications, Inc. and President of Antietam Cable Television, Inc. My business address is 1000 Willow Circle, Hagerstown, Maryland 21740.

2. Schurz is a privately-owned media corporation, founded in 1872. Schurz operates cable systems in several states that offer a comprehensive range of digital television, high-speed Internet and digital voice services. Antietam Cable Inc., founded in 1966, was purchased by Schurz in 1967 and serves residents and businesses in Washington County, MD with offices in Hagerstown, MD, the county seat. Washington County is a rural county in western Maryland 75 miles northwest of the Washington/Baltimore area. Hagerstown is the sixth largest city in Maryland with a population of just under 40,000. Parts of the city are very economically-challenged, as compared to the surrounding county.

3. I joined the company as President of Antietam in 2010, and in addition to my role at Antietam, my responsibilities extend to leading the company's cable systems in Iowa, South Dakota and Arizona. I have been in the cable industry since 1980. I have worked in senior operations leadership roles since 1984 at various cable companies, including Storer Cable, United Artists, and as Vice President and Area Vice President with Comcast.

4. Antietam Cable has approximately 32,000 residential broadband Internet subscribers, 10,000 residential VoIP subscribers, and 27,000 residential video subscribers.

5. Antietam first offered broadband Internet access service in 1998. By 2016, we were offering residential broadband speeds up to 150 Mbps in service areas. In 2012, we implemented DOCSIS 3.0, which enabled us to significantly increase transmission speeds (both upstream and downstream), as well as support a host of other enhanced functionalities for the retrieval and exchange of information. Where we have upgraded to fiber, we are able to offer even faster speeds and enhanced capabilities. Our functionally integrated broadband Internet

service, supported by our high-performance network, offers our customers the capability to freely access all lawful content, applications and services on the Internet, generate and transform content of their choosing, exchange packets with other Internet users and service providers, and utilize a variety of applications including e-mail, web browsing, audio streaming, video streaming, and file sharing, to name a few. Since the inception of our service, we have made no fundamental changes in the functionalities offered or the nature of the broadband Internet access service that we make available to subscribers and potential subscribers. While we have made substantial investments over the years to upgrade and expand our broadband and fiber-optic facilities to deliver higher speeds and increase network capacity and network uptime, giving our customers a better Internet experience, these did not change the nature of what we were offering, only enhanced its performance. Nor, over the years, have we made any substantial changes to the way that we market our broadband Internet access service. From the outset, we emphasized both the always-on capabilities that broadband Internet access would afford subscribers, including the ability to retrieve and utilize the panoply of available Internet content and applications, and the fast speeds at which they would be able to stream, download and upload Internet content. Any change in our advertising in recent years has been more of a change in emphasis than substance. Over time, consumers have increasingly become familiar with the interactive capabilities offered by broadband Internet access and our network has gotten faster, so we focus more on the quality of our service and network performance to set us apart from other broadband Internet providers in the marketplace.

Increased Uncertainty and Compliance Costs

6. The economics of our business were greatly affected by the FCC's Title II reclassification decision. Following Title II reclassification, we incurred increased regulatory compliance costs associated with time spent understanding the impact of the new requirements. None of the services we offer had ever been regulated under the core Title II common carrier service requirements by the FCC or our state public utility commission prior to the FCC's

decision to reclassify broadband Internet access service as a Title II telecommunications service in the 2015 Open Internet Order. Up until that time, we had no experience with either the main statutory Title II obligations – Sections 201 and 202 – or the FCC's rules and decisions implementing them. The Title II decision and the Internet General Conduct standard opened the door to a wide range of burdensome new regulatory requirements at both the federal and state levels, including most importantly the potential for rate regulation, dramatically raising the level of regulatory uncertainty facing our company. This increased our regulatory compliance risks and affected our thinking on further residential network improvements and plant expansion.

7. Following Title II reclassification, we spent significant resources in our attempts to understand the impact of the new requirements. For example, to be deemed lawful under Sections 201 and 201, the rates, terms, conditions and practices associated with our broadband service must be "just and reasonable" and not unjustly or unreasonably discriminatory. The FCC imposed similar obligations pursuant to Title II in its vague and open-ended Internet General Conduct standard. That standard prohibits unreasonable interference or unreasonable disadvantage to consumers or Internet edge providers like Google, Amazon or Netflix. Determining what is a "just and reasonable" service or what is "unreasonable" interference or disadvantage is complicated and requires consultation with legal counsel, as the standard can have a thousand interpretations. Anyone can file a complaint against us with the FCC under Section 208 alleging a violation of Title II requirements or file a complaint in federal court to recover for damages caused by violations of the statute. Being subject to these requirements left us very concerned that our broadband rates and practices would be deemed unlawful after-the-fact by the FCC or the courts, and we had to review all our current and planned offerings against these new standards.

8. Just the risk of such enforcement action required us to increase the amount of time and money we spent on legal services and recordkeeping and, going forward, requires us to ensure funds are always available to defend ourselves against enforcement action. Following

the reclassification decision, we devoted considerable staff time and incurred "well out-of-trend" legal expenses to ensure compliance with the new legal standards. We vetted all our policies and procedures, including our data use plan, against the Title II obligations the Internet General Conduct standard, and assessed the risk of potential government rate setting. We conducted a review of our customer-facing documents and had them reviewed by outside counsel. We are a prudent company and assessed all possible risks. We were not assured by FCC statements that the government would not impose rate regulation despite the lack of immediate tariffing requirements, and we made protectionist moves to shelter the company from risk of enforcement action. We have limited resources, and the extra money spent on ongoing regulatory compliance as a result of the Title II decision is money that is not used for more productive purposes.

Decreased Investment

4. The Title II decision had a detrimental impact on our fiber buildout plans, causing us to pull back on the scope of planned investment and deployment and delay bringing the benefits of fiber broadband services to a larger area of the region we serve for a year. We had previously been looking at a fiber-to-the-home (FTTH) buildout within our existing cable hybrid fiber-coax (HFC) footprint – an augmentation of the current system – and although we went ahead with a portion of the project, we cut back on its scope due to the overhang of Title II regulation and the potential for regulation of our rates. The prospect of Title II rate regulation curbed our enthusiasm for making the greater investment in rebuilding more of our network with fiber to bring higher capacity broadband Internet service to more of our rural Maryland county.

5. What happened is this. We currently serve more than 58,000 homes in Washington County with our HFC network. That is about 96 percent of the county. We saw the value of upgrading to FTTH – a next generation, high performance network solution that can keep up with growing bandwidth demand. Antietam did not have the financial resources to undertake an upgrade project of this magnitude all at once, so we developed a plan to do the

rebuild in phases. We were encouraged by the city of Hagerstown to build fiber in the core downtown area. The city was soliciting proposals for fiber deployment that covered only the core downtown area, which is economically challenged. We developed a plan that would not require a financial contribution from the city; we would self-fund the fiber deployment through revenues. Our intention was to deploy fiber in the economically-depressed downtown core of Hagerstown to promote economic development and also go beyond the core to bring fiber to an even larger area than the city had contemplated. The city evaluated a range of proposals and then gave us the go-ahead on the downtown fiber project.

6. As we were planning this fiber rebuild, we became aware of the FCC's plan to reclassify broadband Internet as a Title II service in its Open Internet proceeding. Although we decided to go ahead with the project because it was important to our community, Title II reclassification caused us to curtail the scope and alter the timing of our fiber investment and deployment. Initially, we only built out half of the area we had originally intended to cover with fiber in Phase One of the project by arbitrarily cutting off addresses that we otherwise would have passed if we were not feeling the overhang of Title II regulation, and delayed embarking on the second half. By September of 2016, we completed the build of 6,000 homes passed in the core of the downtown of the city for an investment of $3 million. We suppressed our expenditures for the second half of the Phase One project, an additional 6,000 households, because of the uncertainty surrounding Title II reclassification – for example, the threat of rate regulation or open access requirements. This delayed bringing the economic benefits of the fiber build to the city generally and access to even faster Gigabit broadband service to the affected city residents in particular. We just announced that we will be building out the second phase of the project to 4,000 additional homes passed by July 2017 and another 2,000 by September 2017, bringing the total number of homes passed by fiber at that time to 12,000. What we announced in 2017 as Phase Two is in reality the deferred second part of Phase One that we had anticipated completing a full year earlier. But for the Title II decision, we would

have fully built out the 12,000 homes we intended to pass in 2016, and we and the city would have reaped the benefits sooner. Based on customer adoption, we hope to continue this process in future phases across more rural areas of the County, assuming regulatory burdens don't create further risk.

7. An FCC decision to revoke the Title II classification will relieve us of the fear of moving forward with our plans to continue the major FTTH Gigabit upgrade of our system and the offering of new services by taking carrier rate regulation off the table. Removing the overhang of Title II regulatory uncertainty will remove the hesitation we have felt in moving ahead with offering consumers innovative new services and doing further upgrades and expansions of our broadband network.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on July 14, 2017.

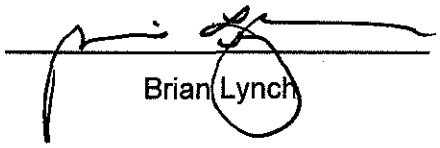


EXHIBIT D

Declaration of Richard Sjoberg

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

DECLARATION OF RICHARD SJOBERG

DECLARATION OF RICHARD SJOBERG
SJOBERG'S INC.

1. My name is Richard Sjoberg. I am President & CEO of Sjoberg's Inc. ("Sjoberg's"). My business address is 315 North Main Ave., Thief River Falls, Minnesota 56701.

2. Sjoberg's is a small, rural company offering residents and communities in rural Northwest Minnesota broadband Internet access, cable, and voice services. I have been with Sjoberg's since 1976. The company is a family business, founded by my parents as a CATV operation in the early 1960s. In 1976, my brother and I took over, and by 1998, we decided to add high speed Internet and digital data offerings for our customers. We added VoIP in 2006. The company has a total of 21 employees. We have two staff members charged with keeping track of our FCC obligations and ensuring compliance.

3. Despite covering mainly sparsely populated regions, Sjoberg's has been committed to bringing broadband Internet to rural areas for over 20 years, just as federal, state, and local policymakers, including the FCC, have said they wanted ISPs to do. We average under 20 homes passed per mile. The smallest town we serve has 23 customers, and the largest town has 3,300 customers. In total, we have 6,800 residential broadband Internet subscribers, 1,600 VoIP subscribers, and 7,500 video subscribers.

4. Sjoberg's first offered broadband Internet access services in 1997. By 1999, we were offering residential broadband speeds up to 5 Mbps in most of our service areas. In 2013, we implemented DOCSIS 3.0, which enabled us to significantly increase transmission speeds (both upstream and downstream), as well as support a host of other enhanced functionalities for the retrieval and exchange of information. Our broadband Internet service, supported by our high-performance network, allows our customers the ability, for example, to freely access all lawful content on the Internet, exchange packets with other Internet users and content, applications, and service providers, and run a variety of applications including e-mail, web browsing, audio streaming, video streaming, and file sharing. The capabilities of our functionally

integrated service have remained the same since inception. We have made no fundamental changes in the functionalities offered or the nature of the broadband Internet access service that we make available to subscribers and potential subscribers since we initiated broadband service. The substantial investments we have made over the years to upgrade and expand our broadband facilities to deliver higher speeds and increase network capacity and network uptime have been to provide our customers with a better Internet experience. These investments have not altered the nature of what we offer, but rather have only enhanced the performance of our broadband network and service for our customers. We have always offered more than just a "dumb pipe," and our broadband Internet access service includes the use of firewalls and SPAM protection in our efforts to protect our network and users against harmful intrusions.

5. Our marketing of the service too has remained constant over the years, and we have not made any substantial changes to the way we describe what we are offering to our broadband Internet access customers. We have always emphasized both the always-on capabilities that broadband Internet access affords subscribers, including the ability to retrieve and utilize the wide variety of available Internet content and applications, and the fast speeds at which they would be able to interact with, stream, download and upload Internet content. Any change in our more recent advertising reflects a change in emphasis rather than substance. Consumers today have become increasingly familiar with the capabilities offered by broadband Internet access, so we focus more in our advertising on the service quality and network performance that distinguishes our service, especially our faster speeds.

Increased Uncertainty and Compliance Costs

6. Uncertainty as to what Title II reclassification would mean for us has increased our costs related to regulatory compliance and consulting fees, harming the economics of our business. None of the services we offer had ever been classified as a common carrier service by the FCC or our state public utility commission prior to the FCC's reclassification decision. Up until that time, we had zero experience with either the key statutory Title II obligations that

require the offering of our service in a just, reasonable and non-discriminatory manner, nor did we have experience with the FCC's rules and decisions implementing these requirements. The Title II decision and the Internet General Conduct standard opened the door to a host of burdensome new regulatory requirements at both the federal and state levels, dramatically raising the level of regulatory uncertainty facing our company. In particular, the potential for rate regulation in the future remains, even if the FCC has not chosen to impose *ex ante* rate regulation thus far. This decision and the uncertainty it engendered increased our regulatory compliance expenditures, had a direct and adverse impact on our ability to finance improvements and invest in our plant, and decreased our ability to innovate and offer our customers new features and services.

7. Following Title II reclassification, we spent significant resources in our attempts to understand the impact of the new requirements, which subject all of our broadband Internet pricing and practices to a "reasonableness" standard. Sections 201 and 202, for example, are self-executing and declare that to be deemed lawful under Title II, the rates, terms, conditions and practices associated with our broadband service must be "just and reasonable" and not unjustly or unreasonably discriminatory and that any rate, term, condition or practice that is not is "unlawful." The FCC's vague and open-ended Internet General Conduct standard, imposed pursuant to its authority under these provisions, similarly prohibits unreasonable interference or unreasonable disadvantage to consumers or Internet edge providers like Google or Netflix. Unfortunately, determining what is a "just and reasonable" service or what is "unreasonable" interference or disadvantage is complicated, and the "reasonableness" standard is one of the most litigated in the regulatory lexicon. Any person can file a complaint against us with the FCC alleging a violation of Title II requirements (and we have been the object of a Section 208 complaint) or file a complaint in federal court to recover for monetary damages caused by violations of the statute. Being subject to these requirements left us very concerned that our broadband rates and practices would be deemed unlawful after-the-fact by the FCC or the

courts and diverted our staff time and resources as we had to run all of our current and planned offerings against those standards.

8. We had to pay outside counsel to help our staff understand our new Title II obligations and the new Internet General Conduct standard and ensure that our existing service and consumer-facing disclosures and notices comply with these requirements. We directed our outside counsel and staff to review or amend our consumer-facing notices and policies to ensure compliance. We altered our broadband data collection and recordkeeping after our review under the new standards. As a result, our staff dedicated to regulatory compliance, as well as the company CEO (due to the obvious "big picture" concerns Title II regulation brings), spent a lot more time than usual with our outside counsel to review and verify changes necessitated by the change in regulatory status of our broadband service to our customer-facing notices and disclosures. We switched at least 10 percent of the energy of company staff who must shoulder a variety of responsibilities over to tracking Title II impacts. The office time we spent on compliance efforts could have been far more productively spent on forward-looking business decisions rather than reviewing past actions against the new common carrier standards. As a small company, we are scrupulously diligent due to the threat of the types of stepped-up FCC enforcement actions we had seen in recent years that could result in huge fines for what appeared to us to be minor infractions. For a company our size, a huge fine can be devastating. Even if you win these cases, you lose because of how expensive it is to fight the battle. All these extra costs add up and deplete our scarce resources.

9. The Title II decision and Internet General Conduct standard also harmed our ability to finance our business by increasing our cost of capital. I cannot emphasize strongly enough the burden of incurring the additional cost of borrowing and the additional paperwork and "due diligence" that was required by our bankers because of their concern over Title II. For financing, we deal with a local bank and a large national bank. We found our borrowing costs increased at both banks following the Title II reclassification. Sjoberg's had been borrowing at

the prime rate, and, for a long time, federal interest rates did not increase. They did start to inch up in 2015, by about ½ to ¾ of a percent, but we found our costs of borrowing rose even more than those increases. Since the Title II reclassification went through in early 2015, our borrowing rates went up 1-1/8 percent, or 1.12%. That is, our rates increased 3/8 of a percent over prime after the Title II decision went into effect. Title II was the only external difference between the borrowing rates we received 3-6 months prior to the decision and those received 3-6 months after. There were no other major changes in our business to account for this. Our business had actually become more profitable. We were able to pay off some loans early and were borrowing for our next wave of expansion. I have sat on a bank board for 20 years, understand a bank's thinking and decision making, and I know from experience that bankers get nervous when they see uncertainty, and the Title II decision caused uncertainty in spades.

10. When borrowing money for equipment replacement and network upgrades, as a small company we must consider the fact that our buildout costs are already more expensive than those of the larger operators. For example, in provisioning a CMTS chassis for a buildout or upgrade, we must make an investment in the entire piece of equipment, even though we are only using 20 percent of the capacity. Those expenditures, although necessary, are inefficient from a capital perspective, so we need to keep our borrowing costs as low as possible to make the investment more efficient. Increases in our interest rates like those resulting from the Title II decision are very harmful to our ability to invest in our plant and expand our broadband service.

Decreased Innovation

11. In addition to increasing our compliance and borrowing costs, the biggest impact of the Title II decision has been its chilling effect on innovation. At every turn, we have to ask ourselves questions such as, if we enter a deal with an Internet edge provider to improve service to our customers, will the FCC open an investigation even if the provider assures us it is legal? For example, at one point we looked at hosting a general caching appliance or a Netflix caching device to lower our cost of transport. Our concern was that these would retroactively

be determined to violate some portion of Title II and we would be in trouble. We were never able to get a statement of indemnification from the sales companies so we abandoned the effort. Beyond that, the prospect of broadband rate regulation hangs heavily over us and has a depressive effect on our incentives to invest and roll-out new features and services.

12. Another consequence of the Title II decision is that it impaired the way we had been doing business. We had been using data caps as a network management tool for our existing service, but discontinued their use because of the potential for FCC enforcement, even though the 2015 Open Internet Order did not prohibit their use. We knew that the FCC was investigating data cap use by the larger ISPs and could not risk a similar investigation of our service. FCC enforcement messages are received loud and clear, especially by smaller, risk-averse businesses like us. It was unclear for what reason the larger ISPs' data cap usage was being investigated by the FCC, and so we had no way of knowing whether what we were doing would also be deemed investigation worthy, or worse yet, subject to fine. We just could not take the risk that our data caps would not be found in violation of the Title II "just and reasonable" requirement or the Internet General Conduct Standard. Unlike the larger ISPs who have some flexibility to absorb enforcement costs, we are a small company and don't have the financial wherewithal to fight against the government even if we think we will prevail. Because the FCC would not give an ironclad seal of approval for data caps, they were too risky for us to continue to employ.

13. Our inability to employ data caps has a detrimental effect on business because we pay a lot to get Internet connectivity out to our remote system. We are located 330 miles northwest of Minneapolis, a data aggregation point. We pay $13 per each Mbps of transport capacity. When an individual customer uses more than a certain amount of data (typically 250-300 GB), we lose profitability because we must add transport capacity to provide a good Internet experience for all. Currently, 10-11 percent of our customers are over this limit in their monthly usage, so, although it is difficult to quantify, we do lose money on them and are

essentially subsidizing some of their Internet use. We have considered raising our prices, but we face competition from a fixed wireline broadband provider, three mobile wireless Internet service providers, one fixed wireless provider, and satellite video providers and we do not want to lose customers.

Decreased Investment

14. Following the Title II decision, the threat of FCC rate regulation had a definite chilling effect on our investment decisions and expansion plans. We have opportunities to extend our network further into rural areas with fewer households per mile, but we were forced to consider whether we want to borrow to execute an 8 to 10-year plan with Title II regulation, particularly rate regulation, looming overhead. This makes us think twice about taking the initial loan and whether to delay, defer or forgo expanding our network because a decrease in our rates due to rate regulation would decrease our ability to repay loans. The real losers under Title II regulation are the underserved rural areas and the small businesses like Sjoberg's that would build out to these areas but for the uncertainty of the regulatory climate.

15. Sjoberg's would otherwise be interested in serving additional rural areas unserved by high speed broadband, but we cannot take the risk of making that investment because of the potential of Title II rate regulation. Further increases in our interest rates due to the overhang of Title II regulation change the viability of our plans to expand into more rural areas. There is no guarantee that future FCCs will refrain from exercising the agency's clear authority to regulate rates under Sections 201 and 202 of the Act or use the Internet General Conduct standard to regulate them through after-the-fact enforcement actions. We saw the harmful effects of cable rate regulation on investment following the FCC's implementation of the 1992 Cable Act. There was a rate freeze, which stopped industry investment in its tracks. Even when the FCC lifted the freeze for the larger operators, it was kept in place for some time for the smaller operators, with truly devastating effects on our ability to improve our plant and service. Having learned from this experience, we were wary of the prospect of rate regulation for our

broadband Internet access service under Title II. And, this is not some abstract fear for us. We at Sjoberg's have our own money on the line – our houses and cars are pledged against our bank loans – so we have our own skin in the game. After-the-fact rate regulation means I could lose everything I have as the result of a regulatory regime designed to constrain the behavior of large monopolists. It simply makes no sense. But the fact of the matter is that the looming threat of FCC rate regulation and an uncertain regulatory environment makes us very hesitant to take on new risks, despite our desire to expand broadband in rural areas.

16. In Northwest Minnesota, we were the first to bring broadband to rural areas 10 years before our competitors entered the high-speed Internet market. Our risk-taking created the market that, in turn, brought a competitive response. Had we gone forward with the recent network buildout we were contemplating, we would have applied for state and federal grants and hired a technician to oversee the work. If we must hire additional staff for regulatory compliance or spend even more on outside counsel and consultants, we have less money for doing a buildout.

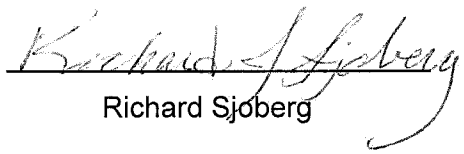
17. The threat of rate regulation has also caused us to delay upgrades of our existing plant. Upgrades require very large capital investments that must be spread over a long period of time to make the investment work. Although we feel relatively safe that the current FCC won't rate regulate our broadband Internet access service rates, we realize that could change in 2021. Accordingly, the investment certainty period right now under Title II is less than four years, which is very short for large capital investments, and it causes a lot of projects to become non-starters. We just cannot take high-risk chances with the company. And being subject to Title II regulation, with all its uncertainties, has quelled many otherwise good investments that would have been made within the last few years.

18. An FCC decision to revoke the Title II classification will relieve of us of the fear of moving forward with plans for a major system rebuild and new services by completely taking rate regulation off the table. Everyone stops when there is a minefield ahead. For us, Title II is

a minefield. Removing the overhang of Title II regulatory uncertainty will remove the hesitation we have felt in moving ahead with offering consumers innovative new services and upgrading and expanding our broadband network into unserved rural areas. It will allow us to focus on forward-looking innovations and investments rather than backward-looking compliance efforts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on July 14, 2017.



Richard Sjoberg

EXHIBIT E

Declaration of Steve Timcoe

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

DECLARATION OF STEVE TIMCOE

DECLARATION OF STEVE TIMCOE
WYANDOTTE CABLE

1. My name is Steve Timcoe. I am Superintendent – CATV Telecommunications at Wyandotte Cable. My business address is 3200 Biddle Avenue, Suite 200, Wyandotte, Michigan 48192. Wyandotte Cable is a municipally-owned provider of voice, video, and broadband services serving approximately 5,400 broadband customers in the suburban area near Detroit, Michigan. Wyandotte also offers electric power generation, transmission, and distribution services, as well as water filtration and distribution to its citizens. As a municipal provider, we are directly accountable to our city government and must be responsive to the citizens of our community who would revolt if our rates and practices were not favorable for the people.

2. I have been with Wyandotte since 1999. In my role, I oversee all CATV – cable/telecommunications operations. I have been working in the cable/telecommunications industry for over 30 years. Prior to my role at Wyandotte, I worked as Chief Technician, Technical Operations Supervisor, Turn Up & Test Manager & Telecommunications Manager at various MSO CATV providers.

3. Wyandotte has approximately 15 employees who are primarily involved with its broadband Internet access, cable and voice services, and over 100 total employees. None of Wyandotte's employees work solely on regulatory compliance matters. Our traditional utility services are segregated operationally from Wyandotte Cable. Although our customer service representatives are cross-trained and serve customers across all our entities and services, including our City operations, the departments are run distinctly and separately, so the resources and expertise in terms of regulatory compliance are different. Our water and electric utility operations are very stable, whereas our communications services are fast-paced and we operate in competitive markets.

4. Wyandotte competes directly with AT&T U-verse, and AT&T U-verse, Comcast, and WOW! serve the surrounding communities. All of our customers are familiar with our competitors' service offerings and we are routinely compared to them, creating competitive pressure for us to keep pace with the larger providers to remain a viable business.

5. Wyandotte first offered broadband Internet access services in 1998 when we completed a system re-build. We launched our broadband Internet access services when speeds were measured in Kbps, not Mbps. Over the years we have kept pace and offered speeds up to 15 Mbps. In 2013, we implemented DOCSIS 3.0, which enabled us to significantly increase transmission speeds (both upstream and downstream) and in July 2017 will be raising our basic residential speed to 75 Mbps with a 150 Mbps service available as well. We also support a host of other enhanced functionalities for the retrieval and exchange of information.

6. Our broadband Internet access service, supported by our high-performance network, is an integrated service offering that offers our customers the capability to freely access all lawful content, applications and services on the Internet, exchange packets with other Internet users and service providers, generate and transform content at the end user's request, and run a variety of applications including but not limited to e-mail, web browsing, audio streaming, video streaming, and file sharing. Since the inception of our service, we have made no fundamental changes in the functionalities offered or the nature of the service we make available to our customers and potential customers. Our investments over the years have been aimed at improving our customers' Internet experience, for example, by increasing available bandwidth and upload and download speeds – rather than change the nature of what we were offering, which is Internet access. Nor have we made any substantial changes to the way that we market our broadband Internet access service. We have always emphasized both the always-on capabilities that broadband Internet access would afford our customers, including the ability to retrieve and utilize the panoply of available Internet content and applications, and the fast speeds at which they would be able to stream, download and upload Internet content. More

recently, we may have placed more emphasis in our advertising on speed and service quality, but that would be because our network is now faster and our customers are more familiar with the enhanced capabilities offered by broadband Internet access service than they were in the early days, leaving us free focus our advertising on service quality and network performance to differentiate ourselves from other providers.

Increased Uncertainty and Costs

7. Title II reclassification harmed the economics of our broadband Internet business. Following Title II reclassification, we incurred increased regulatory compliance costs associated with time spent understanding the impact of the new requirements. None of the services we offer had ever been classified as a Title II common carrier service by the FCC or our state public utility commission prior to the FCC's reclassification decision in the 2015 Open Internet Order. For that reason, up until that time, we had no experience with either the key statutory Title II obligations that require the offering of our service in a just and reasonable and non-discriminatory manner, or the FCC's rules and decisions implementing these requirements. The onerous FCC non-Title II filing requirements were already very burdensome to a small operation like ours. The FCC's Title II decision and its Internet General Conduct standard opened the door to a flood of excessively burdensome new regulatory requirements at both the federal and state levels, including the potential for rate regulation, dramatically raising the level of regulatory uncertainty facing our company. Getting up to speed on common carrier obligations and what they entailed for our broadband Internet service increased our regulatory compliance expenditures, had a direct and adverse impact on our ability to finance improvements and invest in our plant, and decreased our ability to innovate and offer our customers new features and services.

8. Following Title II reclassification, we spent significant resources in our attempts to understand the impact of the new requirements. For example, to be deemed lawful under Title II the rates, terms, conditions and practices associated with our broadband service must be

"just and reasonable" and not unjustly or unreasonably discriminatory. Similarly, the FCC's vague and open-ended Internet General Conduct standard, imposed pursuant to its Title II authority, prohibits unreasonable interference or unreasonable disadvantage to consumers or Internet edge providers like Google or Netflix. The FCC's guidance on how it would apply that standard includes vague factors such as impacts on "end user control" and "free expression." Unfortunately, determining what is a "just and reasonable" service or practice is difficult because the "reasonableness" standard can have innumerable interpretations, and determining what is an "unreasonable" "interference" or "disadvantage" to an end user or edge provider's ability to use the service for purposes of "free expression" is even more complicated. Anyone can file a Section 208 complaint against us with the FCC alleging a violation of Title II requirements or file a complaint in federal court to recover for damages caused by violations of the statute. Being subject to these requirements left us very concerned that our broadband Internet rates and practices would be deemed unlawful after-the-fact by the FCC or the courts. For that reason, we had to run all our current and planned offerings against these new and unfamiliar standards, diverting staff time and resources.

Decreased Investment

9. The FCC's decision in its 2015 Open Internet Order to reclassify broadband Internet access as a Title II telecommunications service caused great apprehension within our organization regarding our business plans, given that we are now faced with the prospect of a costly, burdensome regulatory regime. The level of regulatory uncertainty facing Wyandotte grew tremendously with this decision, depressing the level of investment we were comfortable making, given the prospect of rate regulation hanging over our heads. We took no comfort from statements that the Commission would refrain from rate regulation. Those statements were simply not believable. We had no faith the government would adhere to that position over time. With the Title II classification, we had a real and grounded fear of rate regulation, having seen the impact of cable rate regulation on the cable industry in the early 1990s. The FCC drastically

rolled-back cable rates, paralyzing the industry until the agency got around to granting some relief through its going-forward rules some years later. With respect to the potential for broadband Internet access rate regulation, we could not guarantee that our business would be viable if we undertook expensive broadband plant upgrades only to find the government after-the-fact setting rates below the level we would need to generate a return on our investment.

10. While competitive pressure required us to improve our plant and service, after the Commission reclassified broadband as a Title II service, we cut back and delayed plans to pursue a more expensive next generation rebuild of our system. A repeal of Title II would allow us to more comfortably proceed with that endeavor. The Wyandotte community first decided to build the municipal cable system in 1982 and rebuilt the plant in 1998-1999, so we were in-cycle for another major rebuild in 2017. We knew we would need a new architecture to offer the highest quality broadband services and set aside money in the budget for engineering and consulting services to determine what the rebuilt plant should look like. But because of the Title II reclassification, instead of a large investment in new fiber architecture, we moved ahead only with upgrades necessary to remain competitively viable in the short term (3-5 years). We were apprehensive about making a larger, longer term investment due to the uncertainty of what Title II would mean for us, particularly with respect to the imposition of rate regulation through tariffs or otherwise.

11. With the uncertainty created by the Title II classification, we will likely limit our upgrade to DOCSIS 3.1 rather than undertake a fiber rebuild, which would be preferable from a long-term perspective. The preliminary high-level "guesstimate" of cost forecasts to upgrade to DOCSIS 3.1 came in at about $7 million compared a fiber rebuild cost of $13 million. Amongst other factors in our analysis of how to proceed, the overhang of Title II regulation has factored prominently in our choice to lean towards a lower level of expenditure. We are in a position where we intend to make a decision within the next 12 months, with project completion in 24-48 months dependent upon the direction we head.

12. Without a doubt, the Title II classification has impacted the decisions on our plant expenditures. If we are left alone by the government, we would invest in the best interests of our citizens and make better decisions as we develop our business plans for the benefit of our citizens than would be made under heavy-handed federal regulation and oversight. Even as a municipal provider, we operate as a competitive business in a competitive market, not as a governmental monopoly.

13. An FCC decision to revoke the Title II classification will relieve of us of the fear of moving forward with plans for a major system rebuild and new services by taking Title II rate regulation off the table. If the Title II classification is revoked, we will use the money we have set aside to embark on a full system rebuild. Rather than spending our time on backward-looking compliance efforts, restoration of the Title I classification for broadband Internet service will allow us to focus on forward-looking innovations and investments.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on July 14, 2017.

Steve Timcoe